

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS,)
Deceased, by and through)
MAYOLA WILLIAMS, Personal)
Representative,) Vol. 9-A
Plaintiff,) Circuit Court
vs.) No. 9705-03957
PHILIP MORRIS INCORPORATED,)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the above-entitled
matter came on regularly for Jury Trial and was
heard before the Honorable Anna J. Brown, Judge of
Department No. 7C, of the Circuit Court of the
County of Multnomah, State of Oregon, commencing at
8:30 a.m., Thursday, March 4, 1999.

* * *

Reported by Jennifer L. Wiles, CSR, RPR.

1 APPEARANCES:

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James Coon, Attorney at Law,
William Gaylord, Attorney at Law,
4 Ray Thomas, Attorney at Law,
Christopher Tauman, Attorney at Law,
5 appearing on behalf of the Plaintiff;

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James Dumas, Attorney at Law,
Michael Harting, Attorney at Law,
8 Billy Randles, Attorney at Law,
Walter Cofer, Attorney at Law,
9 appearing on behalf of the Defendant.

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Thursday, March 4, 1999
Reporter's Certificate

* * *

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* * *

1 (March 4, 1999)

2 * * *

3 A.M. P R O C E E D I N G S

4 * * *

5 THE COURT: Good morning.

6 Good morning, everyone.

7 COUNSEL: Good morning.

8 THE COURT: Let me read this, and then

9 I'll be ready to go.

10 I have now had an opportunity to read
11 Plaintiff's written response to the Defendant's
12 104 motion regarding Dr -- is it Farone? Is
13 that how it's pronounced?

14 I think it will be helpful if we start by
15 having Plaintiff state the purposes particularly
16 for which the challenged testimony would be
17 offered, drawing distinctions, if there are any,
18 between offering the evidence as evidence of
19 Philip Morris' state of mind at the time the
20 testing about which Dr. Farone was involved in,
21 which is the subject of this memo, occurred.

22 Because I think the analysis is different
23 if its purpose is to who the state of mind,
24 opposed to substantive evidence about a
25 scientific principle, the latter of which I think

1 does require me to follow the gate keeping
2 functions outlined in the O'Keefe case and
3 others.

4 So, to the extent there is a purpose
5 beyond showing Philip Morris' state of mind and
6 Philip Morris' intent and Philip Morris' conduct,
7 then we do need to do an O'Keefe analysis, but I
8 think Plaintiff needs to tell me first what
9 Plaintiff intends.

10 MR. GAYLORD: Yes, Your Honor. I'll try
11 to do that. I think I agree with your separating
12 that into two subjects and then there's the easy
13 question and then perhaps the harder question.

14 The easy question is, of course, part of
15 our offer, and the reason why this witness should
16 be allowed to testify about these subjects is
17 because he was there and knows very well what the
18 state of mind was at Philip Morris. He is in a
19 position to testify that they understood the
20 relationship between ammonia an pH and a free
21 basing effect and heightened impact of nicotine
22 on the smoker.

23 As our brief memo on this points out and
24 cites several exhibits in evidence, that is all
25 documents, but he's also a live witness to the

1 fact that is what they understood they were doing
2 at the time.

3 He's also an imminently qualified
4 scientist and observer of these facts since his
5 time at Philip Morris and qualified to express
6 his opinions about the basic science of this and
7 the reasonableness of this and to explain his
8 familiarity with subsequent documentation by
9 Philip Morris and others of this effect and
10 confirmation of it by Philip Morris and others.

11 So, that is where I think we would like
12 to go, that far, because he's got the
13 qualifications and because he's here and because
14 he holds those opinions.

15 To the extent that that is controversial
16 and that you need to perform a gate keeping
17 function, we would be happy to put him on and let
18 you --

19 THE COURT: Well, if your proffer for the
20 jury is intended to include both the purposes I
21 summarized, then I think the Defendant's motion
22 requires us to do the gate-keeping analysis.

23 MR. GAYLORD: Yes. We are prepared to do
24 that.

25 THE COURT: All right.

1 Are there any other purposes besides
2 those two general purposes having to do with this
3 ammonia pH issue?

4 MR. GAYLORD: Not except to say, of
5 course, that it fits within the context of all of
6 the rest of his testimony, but I don't think
7 there's a separate distinct goal of that.

8 THE COURT: All right.

9 Anything the defense wants to say
10 preliminarily to the witness testifying?

11 MR. DUMAS: No, Your Honor.

12 THE COURT: Does the defense agree that
13 Dr. Farone may offer evidence about Philip
14 Morris' state of mind and Philip Morris' conduct
15 relative to the addition of ammonia and Philip
16 Morris' awareness of an association between
17 ammonia and a smoker's experience?

18 MR. DUMAS: Certainly.

19 THE COURT: Without necessarily tying it
20 to the scientific base for that.

21 MR. DUMAS: Certainly, Your Honor.

22 I would agree that the 104 function that
23 we are here to do this morning deals with opinion
24 and conclusions of scientific matters and would
25 not directly bear on factual matters concerning

1 what he saw, what he heard, what documents were
2 created by Philip Morris at the time he was
3 there.

4 I would just mention, however, that some
5 of those matters, those factual matters, there
6 may be relevance issues which really would be
7 independent I think of the 104 hearing.

8 There may be relevant relevance issues to
9 those facts, depending on the Court's ruling
10 today on the 104 issues.

11 THE COURT: So, you are suggesting I need
12 to take up the one first and then the other and
13 not rule on relevance now?

14 MR. DUMAS: Well, I think probably not,
15 Your Honor. I think you just need to rule on the
16 104 science issues this morning. I think the
17 relevance issues will have to be taken up as the
18 doctor testifies in depth regarding what he saw,
19 what he heard, what he did when he was at Philip
20 Morris.

21 THE COURT: All right.

22 Mr. Gaylord.

23 MR. GAYLORD: All right.

24 Mr. -- Dr. Farone, will you take the
25 stand, please?

1 THE CLERK: Raise your right hand,
2 please.

3
4 WILLIAM A. FARONE, PH.D.
5 was thereupon called as a witness on behalf of the
6 Plaintiff and, having been first duly sworn, was
7 examined and testified as follows:

8 THE CLERK: Please be seated. And if I
9 can get you to move into the microphone a little
10 bit, and this way a little bit, thank you.

11 And please state your name. Spell your
12 first name and your last name.

13 THE WITNESS: My name is William A.
14 Farone, W-i-l-l-i-a-m F-a-r-o-n-e.

15 THE COURT: Thank you.
16 Counsel.

17 MR. GAYLORD: Dr. Farone, for purposes of
18 this proceeding, the rules permit leading
19 questions and other non-observances of some of
20 the formalities. So, for efficiency, I'll try to
21 do that, so far as I can think of the questions
22 to lead you.

23 First, I'm going to ask the Court and,
24 through the Court and counsel, do we need to do
25 much to establish his qualifications?

1 You are, sir, a Ph.D. in chemistry, with
2 advanced degrees and years and years of
3 experience working in chemistry of products?

4 THE WITNESS: That's correct.

5 THE COURT: Is there a V.C. that I can
6 use for purposes of this gate keeping piece?

7 MR. GAYLORD: We can get you one, Your
8 Honor.

9 THE COURT: Is that all right?

10 MR. DUMAS: That is fine with me, Your
11 Honor.

12 THE COURT: I'm just trying to be
13 helpful.

14 MR. GAYLORD: I'm just trying to get a
15 sense of how much we need to dwell on his
16 qualifications.

17 THE COURT: You are telling me he's an
18 imminent scientist whose opinion I can consider
19 under --

20 Believe me, sir, I don't mean to be
21 disrespectful. I'm trying to be responsive to
22 counsel's point.

23 MR. GAYLORD: Right.

24 THE COURT: The gate keeping function is
25 going to depend on qualifications. I can read

1 this and consider it. You don't need to ask
2 those questions right now. And we'll mark a
3 resume as a Court's exhibit for the record, in
4 any event.

5 MR. GAYLORD: Thank you.

6

7 DIRECT EXAMINATION

8

9

10 BY MR. GAYLORD:

11 Q. Let me start this way, Dr. Farone.

12 From your educational background and your
13 areas of specialty and your years of experience
14 working in chemical products industries, including
15 your leadership of research departments at Lever
16 Brothers, I don't know if I'm adequately describing
17 that at all, and your seven years as the Director
18 of Applied -- am I getting it -- Applied Research
19 at Philip Morris?

20 A. That's correct.

21 Q. And your years since Philip Morris,
22 operating your own business in the chemical
23 products field, do you have an acquaintance with
24 the concept of free basing, if I can just use the
25 vernacular for it?

1 A. Yes, I do.

2 Q. And with respect to the subjects here of
3 adding ammonia to a cigarette product to effect the
4 pH of the filler material -- if I'm getting the
5 right one -- and to have an effect on nicotine
6 delivery and/or impact on the smoker, are those all
7 subjects within your knowledge and experience from
8 your years at Philip Morris and your awareness of
9 the literature in that field, outside of your years
10 at Philip Morris?

11 A. Yes, in general, the chemical phenomenon,
12 going back to probably my natural products courses
13 in 1960.

14 Q. Is the phenomenon, the chemical
15 phenomenon of ammonia acting on the tobacco
16 material, tobacco-like material, if you will, and
17 increasing pH and releasing a greater amount of
18 nicotine into a gaseous phase, is there anything
19 novel or controversial scientifically about that
20 concept?

21 A. Not in my opinion.

22 Q. All right.

23 Is the chemical formula or the chemical
24 actions that take place in that process at all
25 controversial from a chemical standpoint in?

1 A. Not in my opinion. They are taught in
2 college.

3 Q. Are those relationships between increased
4 ammonia, increase of pH release of nicotine, into a
5 gaseous phase, and the resulting change on the
6 makeup of the nicotine in the smoke all subjects
7 that were known and understood and accepted in the
8 research departments at Philip Morris while you
9 were there?

10 A. In my opinion, yes.

11 Q. And were there also conclusions sought
12 and found by Philip Morris during and before your
13 time there about what impact the phenomenon would
14 have on the smoke and the smoker?

15 A. Yes.

16 Q. Summarize for the Judge what was known
17 about that while you were at Philip Morris?

18 A. Well, in any alkaloid, which nicotine is
19 an example, we have a phenomenon which is called
20 the PK. It's the pH or, if you will, at which it
21 becomes neutral. And if you exceed that you put
22 more and more of the material into what's called a
23 free base form, and if you are below that you have
24 more and more of the material in the so-called
25 protonated form.

1 This is an equilibrium. It's affected by
2 many different variables, concentration,
3 temperature, other materials that might affect the
4 pH of the substrate that it's in. And that is
5 known for basically all alkaloids that have been of
6 interest to people, cocaine, codeine, nicotine,
7 nornicotine.

8 And it was known that if you manipulate
9 the pH of the substrate you will, in fact, create
10 more in the free base form which then evaporates or
11 goes into the vapor phase.

12 Q. Now, with respect to the outcome of
13 having done that on the smoker who's smoking that
14 cigarette product, while you were at Philip Morris
15 was there an understanding and belief among the
16 scientists at Philip Morris about how increasing pH
17 and increasing free base nicotine would affect the
18 smoker?

19 A. That is more difficult. I mean, there's
20 an understanding that it had an affect in the
21 satisfaction and in the descriptors that are used
22 in describing how one appreciates the cigarette.

23 But I do not. There was, as far as I can
24 recall that I was aware of at the time, while I was
25 at Philip Morris, no study, for example, which

1 showed that blood 11 cotinine increased
2 proportional to the amount of ammonia. In other
3 words, there were physiological studies that I
4 never saw when I was there.

5 Q. Let me show just a couple of things from
6 our document bank that are in evidence in the case.

7 This is Exhibit 58.

8 MR. DUMAS: I'm sorry. What No, Bill?

9 MR. GAYLORD: 58. I'm not sure how much
10 I have to zoom to read it.

11 BY MR. GAYLORD:

12 Q. But it's March 31, 1966 document, with
13 names of Thompson, T-h-o-m-s-o-n, and Mayer,
14 M-a-y-e-r, progress report, nicotine and smoke pH.
15 And in the conclusions, it says:

16 "Nicotine delivery can be controlled via
17 filler or smoke pH adjustment."

18 Is that one of the conclusions or pieces
19 of information that was known to you during the
20 time there?

21 A. Yes. And I work with both of those
22 gentlemen.

23 Q. And a couple of excerpts from Plaintiff's
24 Exhibit 92, which is a October 1974 document,
25 entitled "Smoke Impact From a Psychologist' Vantage

1 Point," by T.R. Shorey. And is that a document you
2 are familiar with?

3 A. Yes, it is.

4 Q. And I'll just read this quote. This is
5 from a section entitled "Smoke Constituent for
6 Impact."

7 Was impact a term of art used at Philip
8 Morris to describe what you have already described,
9 satisfaction and effect on the smoker?

10 A. Impact and satisfaction are two separate
11 descriptors, but they generally relate to the
12 effect of what you inhale and the feeling that you
13 get, either wellbeing or pleasure that is
14 associated with nicotine.

15 Q. Okay. And I'll quote twice from this
16 1974 document, quote:

17 "Suggesting that smoke impact is due to
18 nicotine, however, is nothing new. The important
19 factor though is not the amount of nicotine in the
20 smoke, per se, but rather the amount of free
21 nicotine in the smoke which determines degree of
22 smoke impact."

23 A. Yes.

24 Q. And is that the same conclusion you have
25 shared with us has having been assumed and believed

1 in the research work at Philip Morris while you
2 were there?

3 A. Yes.

4 Q. And in the section entitled "Importance
5 of PH," quote, "Thus, the amount of free nicotine
6 available to the smoker is determined by the degree
7 of alkalinity (or pH) of the smoke, as well as own
8 degree of alkalinity."

9 Is that also expressing the same basic
10 concept?

11 A. The basic concept, but it's only part of
12 the story. It refers to the pH of the smoke. The
13 pH of the tobacco is equally important in
14 determining how much nicotine is released from the
15 tobacco.

16 Q. And are those two different concepts?

17 A. They are.

18 Q. And are you familiar with documents from
19 scientific work at Philip Morris in later years,
20 after your time, that address these same subjects
21 and carry them forward?

22 A. Yes, I am.

23 Q. Plaintiff's Exhibit 142, a February 5th,
24 1992 document, Philip Morris letterhead, to R.D.
25 Kaiser, from F.P. Gullotta, subject 1991

1 Accomplishments for Project 1620. Whatever that
2 is. Item 2. Are you familiar with Dr. Gullotta?

3 A. Yes, I am.

4 Q. He worked there while you were?

5 A. He did.

6 Q. And if I have got the right part of this,
7 and I'll let you look at this if you don't have it,
8 Item 2, designed and cigarettes prepared from
9 filler to which acids and bases had been applied.

10 Filler, just by the way, just refers to
11 the tobacco material that makes up the rod of the
12 cigarette?

13 A. The mixture of tobacco that goes into the
14 rod, yes.

15 Q. This is really hard to read, but
16 demonstrated a systemic relationship between
17 increases in filler pH and increases in gaseous
18 phase, presumably unprotonated nicotine?

19 A. That's correct. That is -- and that is
20 the most important feature of this form of
21 manipulating nicotine is the filler pH.

22 Q. And so this is a statement in Philip
23 Morris about what they have done in 1991, and it
24 includes that they establish the relationship
25 between those two concepts?

1 A. Well, I think it was established earlier.
2 This is just sort of a continuation of study.

3 Q. Okay. And then maybe more to the point
4 of what we are getting at here, Item 3,
5 demonstrated that the addition of bases to
6 cigarettes enhances subjective and
7 electrophysiological responses?

8 And is that referring to two different
9 aspects of the -- I'm not going to use impact
10 because that is a word with some strings
11 attached -- let's say effect?

12 A. Well, the first one refers to what the
13 person tells you they experience, the subjective.
14 The second one refers to brain wave patterns or
15 some other electro, something you're measuring so
16 they don't have to tell you about it. You can
17 measure it.

18 Q. Okay. So this document is saying that,
19 as of this 1991 research season, so-to-speak,
20 Philip Morris has demonstrated to itself that this
21 exact chain of events that we have been talking
22 about, increasing the base, raising the pH, the
23 same thing, I guess, increasing the amount of free
24 nicotine in the smoke, as both subjective and
25 objective effects on the smoker?

1 A. That is what it says.

2 Q. All right. And that is the same concept
3 that was motivating the addition of ammonia to the
4 cigarettes during the time that you were there and
5 aware of it firsthand?

6 A. I was not the addition ammonia. The
7 addition of compounds that combusted.

8 Q. Okay.

9 And do you hold opinions as a scientist,
10 independent of the first-hand knowledge you had as
11 a team member at Philip Morris, that there is a
12 relationship between -- I was going to say
13 manipulating, but let me say managing the contents
14 of the cigarette so as to increase the pH of filler
15 and enhance the effect on the smoker?

16 A. Yes that was considered to be a very
17 important part of Philip Morris cigarettes as
18 distinguished from competitive cigarettes.

19 Q. Okay. And that reminds me of one more
20 thing I wanted to be sure and do here. Let me just
21 take a second to look. I already have that.

22 I'm going to show you, I'll hand you a
23 copy of Plaintiff's 88, and I'm going to keep one
24 to use on the viewer.

25 MR. GAYLORD: Your Honor, I'm reminded by

1 Mr. Coon to tell you that the copy that I'm
2 showing to Dr. Farone we would intend to offer of
3 this exhibit has some redactions of material, in
4 keeping with prior discussion.

5 THE COURT: So we are not to have heart
6 failure when we see on the screen something that
7 is not redacted? Is that the point?

8 MR. GAYLORD: I guess so. But I don't
9 think it's that heart failure is likely.

10 THE COURT: All right.

11 BY MR. GAYLORD:

12 Q. I'm just following up on some of the
13 history of the document. And that document is
14 marked secret. We know it's an RJR document. It's
15 entitled "Implications and Activities Arising from
16 Correlation of Smoke pH with Nicotine Impact on
17 smoke qualities and Cigarette Sales."

18 By its contents, we know that it's from
19 1973. It is making projections for the first
20 quarter of 1974. It has a list of subtitles that
21 are very interesting because it's largely comparing
22 RJR products to a number of others but principally
23 Marlboro.

24 And it gets to the point of Item 2
25 historical data trends in brand comparisons talks

1 about seeking out significant property differences.
2 We gather available historical and current data on
3 our brands and competitive brands and made
4 comparisons.

5 It soon became apparent that in recent
6 years corresponding to recent sales performance,
7 the most significant difference between our brands
8 and Philip Morris brands and Kool has been in the
9 area of smoke pH.

10 Our data shows that smoke from our
11 brands -- this is outside of what's highlighted,
12 but the bottom paragraph -- and all other
13 significant competitive brands in recent years has
14 been consistently and significantly lower in pH
15 than smoke from Marlboro and to a lesser degree
16 Kool.

17 Then the highlight, all evidence
18 indicates that the relatively high smoke pH shown
19 by Marlboro and other Philip Morris brands and Kool
20 is deliberate and controlled. This has raised
21 questions as to, one, the effect of higher smoke pH
22 on nicotine impact and smoke quality, hence, market
23 performance; and, two, how the higher smoke PH
24 might be accomplished.

25 Smoke pH and Free Nicotine is the next

1 heading. In essence, the cigarette is a system for
2 delivery of nicotine to the smoker in an attractive
3 useful form.

4 Skipping a little bit, as the smoke pH
5 increases above 6.0 an increasing proportion of the
6 smoke nicotine occurs in free form, which is
7 volatile, rapidly absorbed by the smoker and
8 believed to be instantly perceived as nicotine
9 kick.

10 Chart 8 shows how proportion of free
11 nicotine increases as pH goes higher.

12 "Marlboro and Kool smokes contain more
13 free nicotine than our comparable brands; hence,
14 would be expected to show more instantaneous kick
15 than our brands."

16 "As a result, higher smoke pH in the
17 current Marlboro, despite a two-thirds reduction in
18 tar nicotine over the years calculates to have
19 essentially the same amount of free nicotine in the
20 smoke, as did the early Winston."

21 "Thus, currently, the calculated amount
22 of free nicotine in Marlboro smoke is almost three
23 times the amount in Winston smoke."

24 And on further, "In addition to enhancing
25 the nicotine kick, increasing the pH causes other

1 changes, particularly when the increase in smoke pH
2 is achieved by adding ammonia to the blend," and it
3 goes on from there.

4 "Subsequent," this is market correlations
5 and implication, "Subsequent detail analysis by
6 marketing research of our pH and free nicotine
7 data, along with sales data and other factors, has
8 confirmed the strongly positive correlation between
9 free nicotine in smoke determined by pH and total
10 nicotine in smoke and market share performance."

11 And under research activities current and
12 planned, "Methods which may be used to increase
13 smoke pH and/or nicotine kick include increasing
14 the amount of strong burley blend, reduction of
15 casein sugar used on the burley blends, use of
16 alkaline additives usually ammonia compounds to the
17 blend," And then it says methods one through three
18 in combination represent the Philip Morris
19 approach.

20 And, Dr. Farone, does that RJR document,
21 first off, support all of the things we talked
22 about so far this morning, about your knowledge of
23 Philip Morris' point of view and state of mind
24 about this chemistry?

25 A. It supports it. There are some small

1 technical inaccuracies of what they are
2 understanding in that particular time frame that
3 became more clearer as more research went on, but
4 it does support it, yes.

5 Q. And does that document contribute some
6 corroboration to opinions you would express about
7 these subject?

8 A. Yes, and also ties with my experience
9 there around 1980 when it turned out that we
10 determined that RJR started adding more compounds
11 to cigarettes that provided the higher level of
12 ammonia and that created a big stir within Philip
13 Morris.

14 Q. Sounds like this is sort of a competitive
15 reverse-engineering contest between two companies?

16 A. That was -- well, not reverse engineering
17 at the time. At the time it was concluded that RJR
18 had determined -- the let's call it for lack of a
19 better word -- the function of the ammonium
20 compounds, and they had decided to follow suit.

21 MR. GAYLORD: Your Honor, I think that
22 concludes what I would put forth as an offer of
23 proof for Dr. Farone's ability, qualification,
24 knowledge base, and lack of controversy, frankly,
25 about the subjects that have been challenged in

1 the motion and my support for an offer of
2 Plaintiff's Exhibit 88 into evidence.

3 THE COURT: I didn't hear questions
4 asking the witness to explain the science of the
5 phenomenon beyond just the general chemical
6 reaction in equilibrium, and I'm assuming you are
7 not asking more of the witness in terms of
8 explaining the underlying sciences. If you are,
9 you probably need to lay that out so that we have
10 got it all out.

11 MR. GAYLORD: Yeah. I think that is a
12 good point, and I should have made it more
13 explicit.

14 I believe I would stop short of asking
15 Dr. Farone to describe the human physiological
16 mechanisms of how the ammonia pH free base effect
17 changes anything inside the person's body.

18 THE COURT: Okay.
19 Cross.
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CROSS-EXAMINATION

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BY MR. DUMAS:

Q. Doctor, is it my understanding that you do not intend to offer an opinion as an expert scientist or a chemist that the alleged increase in free nicotine as a result of the use of ammonia increases or causes tobacco to become addicted or more addictive?

A. Yeah, I wasn't asked that. So, no.

Q. And that would be consistent with your background as a chemist. You are not a pharmacologist. You are not a medical physician. You're not a toxicologist. And obviously you are not an expert in addiction medicine?

A. No. But I would disagree with that characterization. I think you are aware that I was in charge of all of the toxicology submissions that were made to any government regulatory agency at Lever Brothers from 1972 to '75. And so it became necessary for me to be very, very sure of what was going on toxilogically, including bioavailability studies on things like fluoride and trichlosan and other drugs.

So, while I'm not going to testify about,

1 I mean, if I'm not asked about bioavailability
2 here, I don't want to leave the impression that I
3 don't have the background or qualifications to
4 testify in that area.

5 Q. But now you are not a board certified
6 toxicologist. Have not practiced as a toxicologist
7 with regard to patients?

8 A. That's correct.

9 Q. Okay. And you have not examined, tested
10 humans or done any clinical trials comparing any
11 differences in the nature or the extent of nicotine
12 dependence between smokers who utilize cigarettes
13 that have been treated with ammonia as opposed to
14 smokers who utilize cigarettes that are not treated
15 with ammonia?

16 A. That's correct.

17 Q. And you are not aware of any such peer
18 reviewed studies or articles in the literature on
19 that subject?

20 A. That is a harder question. Peer-reviewed
21 literature?

22 Q. Yes.

23 A. No, that's correct.

24 Q. You mention EEG results. It's not been
25 your practice, nor are you required to, interpret

1 EEG results in relation to how they bear, if any,
2 on human substance dependency or addiction?

3 A. I'm not trained in EEG.

4 Q. Doctor, would you agree that it is
5 presently not possible, on a reliable basis, to do
6 any realtime measurement of pH levels of the vapor
7 phase of smoking in the human lung?

8 THE COURT: In the human lung?

9 MR. DUMAS: Lung.

10 THE WITNESS: Well, first of all, the pH
11 of the vapor phase doesn't have much meaning. I
12 mean, by the time nicotine, for example, is in
13 the vapor phase, they are discrete individual
14 molecules. They are all free base. You don't
15 get protonated free base in the vapor phase. So,
16 I guess I don't understand the question, the
17 relevance of the question.

18 BY MR. DUMAS:

19 Q. Haven't you testified in the past,
20 Doctor, that it is of more relevance the levels of
21 free base nicotine in the vapor phase, as opposed
22 to the particulate phase because it's the vapor
23 phase that gets into the lungs, whereas the
24 particulate phase is generally cleaned out?

25 A. No. I mean, the particle sizes. There

1 is a particle-size distribution of the aerosol.
2 And the larger particles are screened out. The
3 smaller particles are inhaled and then exhaled.
4 There is a region around two-tenths micron where
5 the particles are in fact lodged into the lungs,
6 and that is the part that gets into your lungs.
7 And to the extent that tar contains nicotine,
8 nicotine is delivered in the particulate phase.

9 In addition to that, there is the gas
10 between the particles, and that gas contains
11 nornicotine. So you have it both ways.

12 Q. When you get to the bottom line in this
13 case, Doctor, this case involves the effect of
14 nicotine on the human body.

15 Isn't it true that there is no generally
16 accepted method by which to measure the pH of
17 tobacco smoke when it is in the human lung?

18 A. Yes. I can agree with that.

19 Q. Okay. There's no such studies, there's
20 no empirical data that allows anyone to measure
21 that accurately?

22 A. Yes, that is true. But it's not relevant
23 to the issue of whether or not increasing the pH of
24 the filler causes nornicotine to get into the
25 smoke.

1 Q. Doctor, would you agree that you have not
2 conducted any experiments or clinical trials to
3 measure whether there are any differences in the
4 nicotine levels in the human bloodstream of smokers
5 who smoke ammonia-treated cigarettes, if I can use
6 that term, as opposed to non-ammonia-treated
7 cigarettes?

8 A. Personally, myself?

9 Q. Yes.

10 A. No, I have not done that personally.

11 Q. Okay. And, in fact, there is no
12 empirical data or peer-reviewed published
13 literature that sets out whether there is any such
14 difference in the level of nicotine in the human
15 bloodstream following cigarettes?

16 A. Well, there is. There is evidence to
17 that effect in the literature. That is, if you --
18 it's confounded by other things, but if you make an
19 aerosol out of nicotine, it is a drug delivery
20 device to help people cease smoking, and they use
21 that.

22 There's published literature that, in
23 fact, it doesn't get into your blood and into the
24 brain as fast as it does from a cigarette. And one
25 can infer from that data that, either one of two

1 things, that there's some chemical mechanism that
2 takes the cigarette nicotine to get into the blood
3 faster or a physical mechanism, that is either
4 particle size is better in a cigarette or there's a
5 chemical push, if you will, to get it into the
6 blood.

7 And my conclusion is that part of that is
8 due to the amount of free base nicotine in vapor
9 which occurs in the cigarette which doesn't occur
10 in the aerosol.

11 Q. I understand that is your hypothesis,
12 Doctor, but what wasn't my question.

13 My question was whether there are any
14 peer-reviewed published studies in the literature
15 that set out and compare the differences, if any,
16 in nicotine levels in the human bloodstream,
17 immediately following consumption of cigarettes
18 that have been treated with ammonia tobacco, as
19 opposed to not ammonia?

20 A. Oh, I see, just comparing a cigarette
21 with or without ammonia?

22 Q. Yes.

23 A. Not comparing it to a medical aerosol?

24 Q. Correct.

25 A. I don't know of any. Sorry.

1 Q. And, likewise, you have not conducted any
2 studies or clinical trials that demonstrate that
3 the nature or the extent or severity of nicotine
4 dependency or addictiveness is any different in
5 smokers that utilize ammonia-based cigarettes as
6 opposed to non-treated cigarettes?

7 A. No, I have not done that.

8 Q. Okay. Now, a couple of brief follow-up
9 questions, Doctor, to the questions that were asked
10 to you by Mr. Gaylord.

11 You indicated that you felt, and correct
12 me if I'm wrong, that the utilization of ammonia
13 results in increased pH of tobacco itself? Did I
14 hear that correctly?

15 A. Yes.

16 Q. Okay. Why is that important, Doctor, in
17 your opinion?

18 A. Okay.

19 As you burn a cigarette, compounds that
20 are converted to ammonia generate the ammonia,
21 which sweeps along the rod of the cigarette. You
22 also generate water during combustion.

23 So, the tobacco behind the coal becomes
24 moistened, becomes wetter. If you smoke a
25 cigarette you can actually feel that softening,

1 wettening.

2 And as the ammonia sweeps through wet
3 tobacco, this is very well known, it dislodges all
4 of the alkaloids, including nicotine, turns more of
5 them into free base form, and sweeps them all ahead
6 of the burning coal, ahead of that whole front.

7 So, it's important, the pH of the filler.
8 And what the sweeping ammonia through the wet
9 filler does is it increases the pH because ammonia
10 is converted to ammonium hydroxide base when it
11 gets on the moist filler, and that causes more free
12 nicotine to be released from that filler. That has
13 been shown in many experiments.

14 Q. And wouldn't it necessarily follow from
15 that, Doctor, your analysis, that the result would
16 be an increase in the pH in the smoke itself?

17 A. There could be a relationship between the
18 two, but the problem is that the smoke, the
19 particles, depends on what you are talking about as
20 the pH of the smoke. Once that is separated, gas
21 phase nicotine from the particles, it doesn't
22 matter much what the particle pH is anymore, and
23 that can be influenced by other -- like if you
24 added acids, organic acids, or other things in the
25 filler.

1 As a matter of fact, there's been a lot
2 of confusion over about how both, you know, acids
3 and bases can relate to the release of nicotine.
4 If you put nicotine in as an acid, organic acid, a
5 salt, that breaks down easier and goes into the gas
6 phase in and of itself.

7 The organic acid, if it was incorporated
8 in the particles, would actually drive down the pH
9 of the particle, but you have already released
10 nicotine.

11 So the use of nicotinic salts of certain
12 organic acids could in fact give you a greater
13 amount of nicotine in the gas phase, without
14 increasing the pH of the particle, depends on how
15 it's done and what the compounds are, and it's a
16 very complex issue, as you are probably aware of.

17 Q. Yes. Yes.

18 Finally, Doctor, you indicated that based
19 upon your experience as an employee and during your
20 experience as an employee at Philip Morris, it was
21 recognized, from your testimony, that the increase
22 in pH will result in greater impact to the smoker.

23 And, as I understand your testimony,
24 impact was recognized to be the satisfaction, the
25 greater the pleasure derived from smoking

1 cigarettes.

2 A. And related to nicotine.

3 Q. Doctor, you are not aware, the final
4 question, you have not conducted nor are you aware
5 of any studies which document that cigarettes that
6 delivery increased free nicotine result in smokers
7 becoming addicted to tobacco or more quickly
8 becoming addicted more severely? That's your
9 hypothesis. But there's no established documents
10 or studies that document that?

11 A. Well, I didn't know it was my hypothesis,
12 but, no, I'm not aware of any.

13 MR. DUMAS: That you, Doctor.

14 That is all I have.

15 THE COURT: I would like to first take up
16 argument on the exhibit because I need to be
17 refreshed about where we left it, and then I want
18 to know the purposes for which it's offered, and
19 then take up any objections on the exhibit, and
20 then I'll summarize where I think we are on the
21 witness's testimony.

22 I don't think we have got a lot of
23 controversy here, but I may be missing something.

24 MR. GAYLORD: Subject to Mr. Coon
25 correcting me about what I think the history of

1 that is, since he had the conversations with the
2 Court, I believe, it's an ancient document and
3 escapes the hearsay objection. I think the
4 question left had been its relevance.

5 THE COURT: What is the purpose for which
6 it is offered?

7 MR. GAYLORD: It is offered as
8 corroborative evidence of what Philip Morris knew
9 about their own products and used in their work
10 on their own products.

11 It is sort of an independent look at it,
12 sort of as an outside laboratory's test results
13 on Philip Morris' products.

14 And, in conclusion, they are all
15 corroborative of both Dr. Farone's knowledge of
16 Philip Morris' knowledge of the issues while he
17 was there and his opinions now on these same
18 subjects, the chemical relationships between
19 ammonia, pH, free base effect, impact and I think
20 that is it.

21 THE COURT: All right.

22 So, you are offering it over a hearsay
23 objection as an ancient document, and you say
24 it's relevant to corroborate the awareness in the
25 industry of the state of the art, if you will,

1 about the effect of base or alkaloidal, alkaloid
2 effect.

3 You know, I quit chemistry my second year
4 of college, and there was a reason for it.

5 But for external evidence of the
6 industry's focus on the issue of pH and effecting
7 the impact or delivery or satisfaction of the
8 cigarette.

9 MR. GAYLORD: And I don't want to
10 overlook it also is a comparative analysis of
11 Marlboro and other brands for their pH and for
12 the way that it has --

13 THE COURT: And you're offering that for
14 the truth?

15 MR. GAYLORD: For the truth of the
16 matters asserted in the document about the
17 relationship.

18 THE COURT: This is where you lost me on
19 the 403 part. It may be an ancient document, but
20 it's a document the science of which is not being
21 exposed to cross-examination in terms of the
22 actual scientific findings.

23 If you limited the proffer to what you
24 had previously stated, which is to say this isn't
25 a Philip Morris idea, it is an idea that was

1 known in the industry and it was the subject of
2 interest and concern with our competitors, such
3 that there were studies being done and compared
4 comparative market analyses being done, but when
5 you are wanting to put before the jury the
6 science in the form of literally qualitative
7 analysis with what's in the Kool cigarette and
8 what's in this cigarette and what's in that
9 cigarette, without the opportunity of having the
10 testing cross-examined, that really in my mind
11 crosses over to the unfair prejudice line, if you
12 are talking about offering it literally for its
13 truth. The science absolutely establishes it was
14 this rate or that rate or the another rate
15 without any opportunity for cross-examination.

16 So, I'm very concerned that that is not a
17 fair use of the document.

18 MR. GAYLORD: I think the -- I'm, of
19 course, inclined to accept that limitation in
20 terms of, because as this motion demonstrates,
21 this is apparently a controversial area, and the
22 fact that the industry is there at that time and
23 saying those things answers to the question is
24 this controversial? Is this some sort of weird
25 science or is it a fact known in the industry? I

1 don't think the measurements of the pH is where
2 the controversy is particularly.

3 So I'm kind of inclined to continue my
4 argument on that point, but perhaps the
5 interpretation of why is it that way or what are
6 the, you know, RJR's -- RJR's interpretation of
7 the motivations of Philip Morris about this, I
8 guess, I would accept, I would continue my
9 proffer and accept that restriction with that
10 interpretation may be outside.

11 THE COURT: All right.

12 Let me let the defense address the
13 exhibit and the witness's testimony, and then
14 I'll have a final word from Mr. Gaylord, and then
15 I'll rule.

16 Would you count jurors, please?

17 Mr. Dumas.

18 MR. DUMAS: Your Honor, with regard to I
19 believe it was 58.

20 Is that what we are talking about,
21 Mr. Gaylord?

22 THE COURT: Mr. Gaylord, is it 88 or 58?

23 MR. GAYLORD: This is Exhibit 88. I did
24 show early Exhibit 58 earlier, they are RJR
25 documents.

1 MR. DUMAS: Your Honor, I was involved in
2 the original argument to the Court on this, but
3 this is a hearsay document. There is absolutely
4 no question about that in my mind.

5 THE COURT: Well, stop. Stop right
6 there. We are not talking about whether it's
7 hearsay. We are talking about an exception to
8 the hearsay rule.

9 MR. DUMAS: I know that. I know that.

10 THE COURT: Well, then don't preach to me
11 you have no doubt that it's a hearsay document.
12 We're not talking about whether it's a hearsay
13 document. We are arguing about whether an
14 exception applies, and, if it does, whether 403
15 overrides the exception.

16 MR. DUMAS: The reason for my comment was
17 because Mr. Gaylord seems to be offering it for
18 two grounds. He seems to be offering it for
19 somehow notice in the industry, not hearsay, and
20 then he also claims that there's a hearsay
21 exception based on an ancient document. Okay.

22 There is no evidence that I'm aware of
23 that this document ever reached Philip Morris or
24 was in the Philip Morris files. Therefore, how
25 can it be notice to Philip Morris?

1 The fact that Reynolds may have conducted
2 these studies for their own purposes is not
3 notice to Philip Morris.

4 Whether the industry -- whether it's
5 Reynolds or Liggitt or Lorillard or anyone else
6 may have been aware in their own opinion about pH
7 level of Marlboro and what effect that may or may
8 not have on market share is not the point. That
9 is not notice to Philip Morris of anything.

10 So, I don't see how it comes in as notice
11 to the industry. That is not -- that is not an
12 issue in the case. What's an issue in the case
13 is what did Philip Morris know? And this
14 document does not purport to provide notice to
15 Philip Morris of anything. Okay.

16 THE COURT: Okay.

17 MR. DUMAS: If Mr. Gaylord is offering
18 this document as an exception to the hearsay rule
19 as an ancient document, Your Honor, it's not
20 relevant because Philip Morris didn't have this
21 document, number one. And, number two, 403, I
22 believe, the prejudicial value far outweighs the
23 probative value.

24 Providing some sort of blanket rule that
25 every ancient document comes in because it's more

1 than 20 years old would, under certain
2 circumstances, defy, deprive a party to
3 fundamental fairness.

4 We can't cross-examine these Reynolds
5 scientists. We can't cross-examine how these
6 tests were done or how they were interpreted.

7 THE COURT: I think you're preaching to
8 the choir on that one.

9 MR. DUMAS: Very well. Then I'll stop
10 preaching.

11 THE COURT: I agree with the substantive
12 argument that the scientific content of the
13 document, even if it is otherwise admissible as
14 an exception to the hearsay rule, is unfairly
15 prejudicial because there's no opportunity to
16 cross-examine or test the bases of how those
17 conclusions got there.

18 So, I agree that if the exhibit was
19 admissible, in any event, there would not be
20 usable for any substantive evidence of the
21 competence of the scientific testing that is in
22 the document.

23 Now, let's go back a couple of steps.

24 The document is an RJR Reynolds document.

25 Yes?

1 MR. GAYLORD: Yes, Your Honor.

2 THE COURT: Available to the Plaintiff
3 because it's on the Internet?

4 MR. COON: That is one reason, yes.

5 THE COURT: Okay.

6 Is there any evidence that this RJR
7 document was available or known to Philip Morris?

8 MR. COON: Not pre-litigation, no.

9 THE COURT: Well, not for my purposes
10 today.

11 If I had an RJR witness here to testify
12 that it was known in the industry that pH
13 affected impact and the satisfaction of a
14 cigarette, because it effected amount of nicotine
15 that was free base, that might be relevant
16 evidence.

17 That RJR has internal secret documents
18 which it's obsessing over the pH of the nicotine
19 and comparing it to its apparently significant
20 competitor Philip Morris, shows that RJR was very
21 much aware of the issue, but I don't think that
22 it necessarily shows that Philip Morris was aware
23 of the issue.

24 So, I think -- are you about to rise to
25 Mr. Gaylord's proffers?

1 I think Mr. Dumas' point deserves some
2 consideration in response.

3 MR. GAYLORD: I wonder if I could have a
4 moment?

5 THE COURT: Have a moment, but don't
6 expect me to take up all three of you.

7 Do we have all 16 jurors?

8 THE CLERK: We do, Your Honor.

9 MR. GAYLORD: Your Honor --

10 THE COURT: Yes, Mr. Gaylord.

11 MR. GAYLORD: I think of the two kind of
12 competing arguments that I'm hearing from the
13 defense about this, once we are past the hearsay
14 question and the relevance question, a relevance
15 question arises.

16 You know, as with 403 issues, generally,
17 it's either not relevant or too relevant. It's
18 kind of the competing sides of it.

19 The too relevant issue, I think, there's
20 a logical claim that it is too relevant in some
21 senses and, as I said earlier, for the
22 interpretations that it draws about the kind of
23 underlying facts there.

24 But if we step back from that one step to
25 the question that seemed to have been a

1 controversy that arose with this 104 motion this
2 morning, is there a relationship between ammonia
3 an pH, is this a cigarette product that
4 capitalized on that?

5 I think this document shows a relevant
6 fact which is that the industry didn't consider
7 that controversial, and I think in conjunction
8 with Philip Morris' documents one of which is
9 within the following year after this entitled, I
10 showed, in '92, I showed this in our motion,
11 "Smoke Impact From a Psychologist's Vantage
12 Point," this is corroborative of the same point.

13 THE COURT: But let me say this and maybe
14 it will be helpful. I have considered the RJR
15 document in this 104 hearing because I may
16 consider matter that is not admissible, and I
17 have considered it as corroborative of the
18 witness's general analysis and the chemical
19 properties about which he has been testifying.

20 And my basic knowledge of chemistry took
21 me far enough to where I could follow what he's
22 saying.

23 He's saying, as a Ph.D. in chemistry,
24 there is a chemical reaction, an equilibrium, you
25 apply this energy at this end, you light the

1 cigarette and it creates certain chemical
2 compounds and they, in the equilibrium, produce
3 something else, the effect of which is an
4 increased pH in both the filler, the material in
5 the rod, and in the smoke.

6 But when the nicotine in the smoke is
7 free base, there is no controversy, it seems to
8 me, that Philip Morris was aware of and took the
9 position that increasing the pH increased the
10 smoker's positive response to the experience.

11 This witness did not testify in response
12 to your questions, Mr. Gaylord, that that means
13 more addictive. All right.

14 I understood that to be the subject of
15 this motion, the addiction conclusion. And you
16 didn't ask the question. He doesn't seem to be
17 offering that opinion. And that may be an
18 argument and an inference the jury can logically
19 draw when hooking everybody else's testimony
20 together.

21 But it seems to me we don't have a
22 controversy for purposes of the 104 proceeding,
23 if I'm summarizing the proffer correctly.

24 The witness may testify. He's imminently
25 qualified as a chemist to testify about the

1 chemical properties of what pH is -- we have got
2 a little bit of that through Benowitz -- what the
3 increasing it past or the higher PK, the more
4 likelihood there is free base. The more free
5 base, the more the smoker's report a positive
6 satisfaction, a positive impact, wellbeing,
7 pleasure, all of those things.

8 The witness, A, doesn't need to testify
9 about addiction, and I don't yet have a
10 foundation from which I could allow him to do
11 that over the Defendant's objection.

12 Now, if the defense takes the position in
13 cross-examination that this is controversial,
14 this was unknown in the industry, this is
15 something that is unique to the witness, he's
16 making it up, you know, pH effect on nicotine in
17 the filler and in the smoke is something totally
18 unreliable, then I think we have a different
19 picture in the 403 balance about the extent to
20 which what others were doing in the industry
21 about this may bear.

22 But right now I think the 403 balance
23 falls in favor of excluding RJR's focus on pH
24 because there's no direct evidence it impacted
25 Philip Morris and there is no direct challenge

1 that Philip Morris wasn't doing exactly what this
2 witness is about to tell the jury they were
3 doing.

4 So, to the extent it's not challenged,
5 the need for evidence which is a very important
6 part of the 403 balance, undercuts it, and its
7 risks outweigh its probative value --

8 MR. GAYLORD: If I can address --

9 THE COURT: -- is where I am, before they
10 have even had a chance to talk. So, they need to
11 talk in a minute.

12 MR. GAYLORD: Just very briefly, I may
13 have been over-interpreting the Defendant's
14 position about where we are on this because I had
15 perceived that there was a challenge.

16 And if, in fact, Defendants are going to
17 stipulate that this was not controversial, that
18 that was a known fact, that this is the position
19 that Philip Morris was in and knew it was in at
20 that time, then I would agree that undercuts the
21 relevance and the need for this document.

22 I understood both from the motion that
23 was filed this morning and from other things that
24 we have seen in cross-examination of witnesses
25 and from opening statements about that ammonia is

1 in everything and that there's nothing special
2 about it here and that there was no manipulation
3 of anything, I believe opening statements lay the
4 foundation for relevance of this document, unless
5 counsel is prepared to stipulate now that that is
6 not their position.

7 THE COURT: Well, let's hear from
8 counsel.

9 But I want to say, in my 104 capacity,
10 that I heard nothing from the witness in response
11 to your questions, Mr. Gaylord, that I would
12 presently exclude on the basis that he is not
13 qualified to offer those opinions because the
14 proffer was simply flat-out chemistry and fact
15 evidence about what is going on in Philip Morris
16 relative to the pH chemistry and the interest in
17 pH chemistry as it related to in a way that is
18 not explained bioavailability-wise, but as it
19 related to the smoker's satisfaction, impact,
20 wellbeing or pleasure.

21 MR. GAYLORD: I don't want to lose one
22 point there, and just for clarification before we
23 do this in front of the jury.

24 I'm not offering Dr. Farone and haven't
25 asked him questions about bioavailability and, as

1 counsel pointed out, nicotine addiction, but I
2 think that is a different question than what was
3 the mind set of he and his staff and his
4 colleagues at Philip Morris about whether these
5 things affected that.

6 THE COURT: I agree. And I don't mean to
7 suggest that you can only do chemistry. The
8 witness is, in fact, a fact witness about what
9 went on at Philip Morris. But what his
10 scientific presentation was this morning was
11 really, in my mind, and I haven't yet heard the
12 defense analysis, but in my mind, it is not
13 scientific evidence for purposes of a gate
14 keeping function.

15 He hasn't said anything from a witness
16 stand that isn't just basic chemical equilibrium
17 analysis, acid-base analysis, and an expression
18 of fact about what Philip Morris thought that did
19 relative to the user's desire to smoke their
20 product. That is what I'm hearing.

21 MR. GAYLORD: And I have asked him his
22 opinion, and I will ask him his opinion about all
23 of these things, too, within what we have talked
24 about.

25 THE COURT: As long as the opinion does

1 not stray into asking this witness to comment
2 about addictiveness or conclusions about making
3 the cigarette more addictive, as long as the
4 witness is not asked questions about
5 bioavailability explanation theories, I don't
6 think we are going to have a problem based on
7 what I have heard.

8 But we still haven't heard Mr. Dumas.
9 So, we better let him jump in.

10 MR. DUMAS: Your Honor, with regards to
11 the 104, I don't think I have to jump in. I
12 concur with the Court's comments. That is
13 exactly what I was thinking about. If he's not
14 going to testify about bioavailability, increased
15 addiction, I don't think we have a problem.

16 I would ask, in the spirit of the Court's
17 general rule, since it was Mr. Cofer who gave the
18 opening statement, he would like to respond to
19 counsel's request for a stipulation, with the
20 Court's permission.

21 MR. COFER: Not only that, I am going to
22 cross-examine Dr. Farone. So, I want to make
23 sure that we are all on the same page, consistent
24 with Your Honor's ruling and in spirit of the
25 offer.

1 Where I think we are going to be is that
2 we will stipulate that the science, under
3 science, if you change the pH of the surrounding
4 environment enough, you can affect the
5 distribution of protonated and unprotonated
6 nicotine. Where I think the issues are is does
7 that happen in cigarettes? And, second, what
8 does that mean to the smoker?

9 THE COURT: Well, right now I believe
10 this witness is qualified to testify as a fact
11 witness that Philip Morris was aware that
12 increased pH increases the positive response from
13 the consumer.

14 That there is free nicotine in both the
15 smoke and in the filler in the rod, that that
16 free nicotine was something about which Philip
17 Morris was concerned, in order to increase the
18 reaction, the impact, whatever you want to talk
19 about, whatever word you want to use, he can talk
20 about all of the chemistry involved in that.

21 What I understood the 104 motion to
22 address is whether there is a basis for the
23 witness to offer an addiction conclusion from
24 that evidence, and that is not being proffered at
25 this point.

1 And the terms bioavailability aren't
2 going to be used in the form of the chemical
3 chemistry analysis for purposes of the jury.

4 So, right now I'm sustaining the
5 Defendant's objection to use of Exhibit 88.

6 The extent to which a controversy
7 develops in cross-examination, may be the basis
8 to open the door to that, because the more
9 there's an argument that this is really novel,
10 controversial stuff, the more it's fair to allow
11 the Plaintiff to show it isn't controversial at
12 all. The No. 1 competitor for Philip Morris was
13 doing the very same work and. You know, that is
14 where I see the 403 issue going.

15 MR. GAYLORD: One last point. I don't
16 want to trip anybody up or be out of bounds at
17 some point. It may be appropriate in the course
18 of his testimony to show documents from Philip
19 Morris that corroborate using bioavailability
20 language.

21 THE COURT: Thier language is their
22 language.

23 MR. GAYLORD: Yes.

24 THE COURT: Philip Morris' language is
25 always available to use in the trial. But

1 bioavailability is taken on a sort of an alarmist
2 term here, and it's been the subject of both of
3 the 104 motions. The witnesses should not use it
4 in the form of individual opinions about the
5 biological response to the chemical evidence that
6 is being described, but it didn't sound like this
7 witness was going there.

8 So, you keep looking at me in a very
9 worrisome way. So, I'm wondering am I mishearing
10 something?

11 MR. GAYLORD: No. I just want to be sure
12 that I'm not causing a problem for myself and the
13 witness.

14 If I go into the subjects of Philip
15 Morris' subsequent confirmations of
16 bioavailability and his ability to interpret that
17 term in that context, that is all I want to be
18 sure of.

19 THE COURT: No.

20 No, he's a Philip Morris knowledgeable
21 witness. If Philip Morris uses the word, he can
22 explain what he thought it meant in that context.

23 What I'm saying, their motions have been
24 focused on, is what was originally denominated,
25 the Benowitz bioavailability afferent nerve

1 theories, asking a witness to tell the jury what
2 those theories are, as a matter of what they call
3 hypothesis.

4 I think you are absolutely in safe
5 territory to talk to witness about the facts
6 Philip Morris was working on at the time and the
7 chemistry of pH and how it affects nicotine in
8 the two ends of the cigarette and what Philip
9 Morris thought about that, relative to its impact
10 on the smoker.

11 One last thing.

12 MR. COFER: Okay. Just so we are all on
13 the same page, I just want to make sure that I'm
14 not doing anything that I'm not supposed to.

15 Where we are is science does say that if
16 you change the pH of the surrounding environment
17 you can affect the distribution of bound and free
18 nicotine. That is not controversial.

19 The issue is does that happen in
20 commercial cigarettes? I may well ask him that.
21 Any evidence that happens in commercial
22 cigarettes?

23 THE COURT: Well, I think I know what his
24 answer will be, based upon what I heard in the
25 offer of proof, but let's wait and see.

1 MR. COFER: Yeah.

2 THE COURT: I suspect you know what his
3 answer is going to be. I can't imagine you
4 haven't been here before.

5 MR. COFER: We have been here before.

6 And the next question is, of course, the
7 one that we are all talking which is what does
8 that mean, bioavailability, addiction?
9 Obviously, if I ask that question, I would be in
10 peril, perhaps.

11 THE COURT: You know, everything
12 Mr. Gaylord asked the witness in the proffer, he
13 my ask.

14 MR. COFER: All right.

15 THE COURT: And I'm ruling out Exhibit 88
16 as a document for the jury.

17 If you think, Mr. Gaylord or Mr. Coon or
18 Mr. Thomas, the door has been opened, just let me
19 know. We'll take it up outside the presence of
20 the jury on redirect on No. 88, but I think this
21 witness is on perfectly safe ground talking about
22 chemistry and to talk about what he knew was
23 going on at Philip Morris at the time.

24 For the record, I would like to have the
25 resume of Dr. Farone marked as Court's 3.

1 If this is your only copy, I'll give it
2 back, and you can give me a new one.

3 MR. GAYLORD: That is my only one.

4 THE COURT: Right.

5 Is there anything else now before we
6 bring in the jury?

7 MR. GAYLORD: I have a couple of points,
8 again to avoid tripping up, and I think this is
9 the opportune time.

10 I want to be sure. Part of what I'm
11 saying is I wasn't the one paying as close
12 attention as my college was when some of the
13 motions in limine have been dealt with. So I
14 want to be sure about a couple of points.

15 The word usage of this witness. He came
16 into the controversy and litigation of cigarette
17 litigation basically through the auspices of the
18 FDA who subpoenaed him, if I'm not mistaken, or
19 somebody subpoenaed him. But he became involved
20 through government agency investigations, one way
21 or another. And I think that is a part of the
22 story that deserves to be told and needs to be
23 told for credibility sake and so forth.

24 But I don't want to be -- I don't think
25 anybody would be surprised to learn that there's

1 an FDA. I don't think the jury is in the dark
2 about that. But I understand there's some
3 restrictions about talking about the FDA, and I
4 don't want to cross a line.

5 THE COURT: Well, the restrictions we
6 were concerned about had to do with other tobacco
7 litigation, other tobacco settlements, the
8 Minnesota litigation, and so forth.

9 We also have the issue about the
10 Noerr-Pennington concern, the extent to which
11 there is an application by any citizen to the
12 government for redress of grievances, that that
13 can't be a basis for liability.

14 If your concern is that you need to
15 explain to the jury how Dr. Farone from Philip
16 Morris person became a witness for the Plaintiffs
17 in a lot of cases because they may want to do
18 that very point on cross, that is a fair subject
19 to talk about.

20 So let's see what the defense's concern
21 is about that if at all.

22 MR. COFER: Well, I think it's context.
23 I understand the fact that the FDA contacted Dr.
24 Uydess was excluded during Dr. Uydess' deposition
25 or reading of this testimony.

1 I do think it's fair game for Mr. Gaylord
2 to ask Dr. Farone were you contacted by a
3 government agency with respect to your work at
4 Philip Morris? The answer is yes. That is how
5 you service to? Answer yes. I don't think we
6 need to get into FDA regulations, hearings,
7 Kessler, and all of that stuff. Of course, I
8 will question motives and bias and all of that
9 stuff.

10 THE COURT: And then there will be more
11 opportunity on redirect to go back into motives
12 and potential involvement, one side or the
13 another.

14 But I tend to agree that it's better to
15 soft peddle the FDA as a named agency and make
16 the point, which I think can you fairly make
17 euphemistically, that he didn't go to this
18 controversy voluntarily. He was asked by a
19 government agency or directed by a government
20 agency to respond, if that is the truth. I don't
21 know.

22 MR. GAYLORD: There may be one or two
23 other contexts in which the phrase FDA is part of
24 his testimony just because it has been some of
25 the logic behind some of the positions taken by

1 the industry.

2 THE COURT: And I don't think lightening
3 will strike if the word, letters FDA come out of
4 the witness's mouth, so long as they are not in
5 the form of trying to bolster the witness's
6 opinion or to put some kind of approval on what's
7 going on.

8 But, as to the particular inquiry, how
9 did you get involved in tobacco litigation? A
10 government agency subpoenaed me and I became
11 known to the world as a good way to get started.
12 Without there being a lot of particular reference
13 to the proceeding or the number of hearings and
14 all of that.

15 MR. COFER: And just so Your Honor knows
16 what's coming, what the sort of questions they
17 will ask and the sort of testimony they will
18 elicit is Philip Morris did or didn't do
19 something because they were concerned about FDA
20 regulations? And that comes up, that is fine.
21 I'm happy to discuss that with him.

22 THE COURT: It already has.

23 MR. COFER: Right.

24 THE COURT: Okay. Two minutes.

25 MR. GAYLORD: I think we have learned

1 that the reader for the answers to Mr. Merryman's
2 deposition questions is unavailable tomorrow, and
3 we are down to what we think is the last 15
4 minutes of that.

5 MR. THOMAS: Correct.

6 THE COURT: So you want to put your
7 former newscaster back on?

8 MR. GAYLORD: Thinking that it will not
9 upset the overall schedule of Dr. Farone's
10 availability, we may do that now.

11 THE COURT: It's your case. It's your
12 offer of proof. You have got the witnesses here
13 on meters, and, whatever works, works for me.

14 Okay. Doctor, if you will step down for
15 just a bit.

16 In two minutes, we are bringing in the
17 jury whether you are here or not. Okay.

18 * * *

19 (Whereupon, after a brief recess, the proceedings
20 continued, in the presence of the jury, as follows:)

21 * * *

22 THE COURT: The jury, please.

23 Good morning, jurors.

24 JURORS: Good morning.

25 THE COURT: We have been working outside

1 your presence since 8:30. I regret that you have
2 had to wait as long as you have, but we just had
3 to get some things resolved, and they are now
4 resolved.

5 You'll see Mr. Hartman is back on the
6 stand. He was reading the testimony of witness
7 Merryman when we concluded yesterday. I'm told
8 there's only about 15 minutes more of that
9 reading. So, we are going to finish that up
10 before the Plaintiff's next witness is called.

11 Mr. Thomas.

12

13 WALKER MERRYMAN

14 was thereupon called as a witness on behalf of the
15 Plaintiff, in the form of previous testimony, read
16 into the record by a reader on the witness stand,
17 giving answers to questions posed by counsel, as
18 follows:

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DIRECT EXAMINATION

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BY MR. THOMAS:

Q. Can you direct your attention, please, to what is marked in this trial as Plaintiff's Exhibit 28. This is a report on a visit to the United States and Canada, April 17th to May 12th, 1958, by Mr. Bently, Felton & Reid of B.A.T. Company Ltd.

A. All right.

Q. This is four years after the Frank Statement; correct?

A. Yes, sir.

Q. Have you seen this document before?

A. I saw it recently because you or your colleagues indicated that you wanted to ask me about it. I -- I -- I looked it over briefly.

Q. So, a lawyer showed it to you because we gave them notice that we were going to ask you about this document; right?

A. Yes, sir.

Q. First time you saw that document?

A. I may have seen it in my deposition last year.

Q. Okay. Now we go to the itinerary page.

Now you see that these individuals

1 visited with a number of companies and institutions
2 during this trip in 1958; correct?
3 A. That is what it indicates.
4 Q. And is one an American tobacco company
5 which is and has been at times one of your member
6 companies; correct?
7 A. American has been a member, yes.
8 Q. Okay. And you see Mr. Hanmer and
9 Mr. Harlan and Mr. Harlow there; correct?
10 A. Correct.
11 Q. Philip Morris and another member company;
12 correct?
13 A. Yes, sir.
14 Q. Do you know what positions Mr. O'Keefe or
15 Mr. Seligman held?
16 A. No, sir, I do not.
17 Q. Okay. A. D. Little, do you know what
18 that is?
19 A. I believe it's a research --
20 MR. DUMAS: Hold it, counsel. Counsel,
21 that is out. It stops right there.
22 MR. THOMAS: Show me where you want me to
23 start. Okay.
24 BY MR. THOMAS:
25 Q. Okay. And TIRC, you know what that is?

1 A. I'm sorry. You are going to have to show
2 me where you jumped to.
3 Q. That is a yes, sir.
4 A. Yes, sir.
5 Q. And what is that, sir?
6 A. Tobacco Industry Research Committee.
7 Q. Okay. And that became CTR?
8 A. It did, yes, sir.
9 Q. Roswell Park Memorial Institutue, Yale
10 University Biological Research Institute, Roscoe
11 Jackson Laboratory, do you know any of those
12 institutions?
13 A. I have heard of some of them, yes.
14 Others I'm not familiar with.
15 Q. The Industrial -- or excuse me. The
16 Industrial Technical Committee of TIRC, are you
17 familiar with that organization?
18 A. No, sir.
19 Q. Do you I know it's part of TIRC or was at
20 that time?
21 A. Well, that's what it says. I wasn't
22 familiar with it.
23 Q. National Cancer Institute, you heard of
24 that organization?
25 A. Yes, sir.

1 Q. Johns Hopkins Hospital, you have heard of
2 that?
3 A. I have.
4 Q. New York University, you have heard of
5 that?
6 A. Yes, sir.
7 Q. And Sloan-Kettering, you've heard of
8 that?
9 A. Yes, sir.
10 Q. And TIRC in New York, you've certainly
11 heard of Dr. Little; correct?
12 A. Yes, sir, I have heard of Dr. Little.
13 Q. And you have heard of the Scientific
14 Advisory Board of the TIRC; haven't you?
15 A. Yes, sir.
16 Q. Do you see at the top that these
17 individuals report they were seeking information on
18 certain questions?
19 A. That is what it says.
20 Q. Okay. And one of the questions was the
21 extent to which it is accepted that cigarette smoke
22 causes lung cancer. Do you see that?
23 A. "Causes," in quotes, as if to set it off,
24 yes, sir.
25 Q. Okay. Well, does the quotes mean

1 something to you?

2 A. I don't know. It's the only thing I see
3 there that is set off that way so --

4 Q. Okay. Now, if you go down to the first
5 paragraph, it states "With one exception, (H.S.N.
6 Greene)" And Mr. Greene was at Yale University
7 correct?

8 A. I believe he was. Yes, sir.

9 Q. Okay. "With one exception, the
10 individuals who we met believe that smoking causes
11 lung cancer if by, quote, 'causation,' end quote,
12 we mean any chain of events which leads finally to
13 lung cancer and which involves smoking as an
14 indispensable link." End quote.

15 Now, he doesn't -- or the authors of this
16 report don't exclude any of these other individuals
17 as exceptions to that statement, do they?

18 A. They do not.

19 Q. Can you turn to Page 8?

20 Do you remember, sir, that when we were
21 talking about statistical association you said
22 there are factors that are taken into account,
23 although you don't know how they are taken into
24 account when you look at statistical associations
25 in making a decision whether or not there's a cause

1 and effect relationship or not, do you remember
2 that?

3 A. I believe I said that I was aware some
4 people believed those are important to consider,
5 yes, sir.

6 Q. Okay. That was the consistency of the
7 association, the strength, et cetera; right?

8 A. And the others you mentioned, yes, sir.

9 Q. Now, in the conclusions here --
10 Bill I need --

11 Now, in the conclusions here, do these
12 gentlemen report, after meeting with all of those
13 individuals in America and Canada, No. 1,
14 "Although," quote, "Although there remains some
15 doubt as to the proportion of the total lung cancer
16 mortality which can fairly be attributed to
17 smoking, scientific opinion in the U.S.A. does not
18 now seriously doubt that the statistical
19 correlation is real and reflects cause and effect
20 relationship."

21 A. You have read that accurately, yes, sir.

22 Q. Did anyone in the tobacco companies,
23 American, Philip Morris, Liggett & Myers, ever tell
24 you about this from the time you started with the
25 Tobacco Institute in 1976 right up to the present

1 time?

2 A. I have not been made aware of this
3 internal document from British American Tobacco,
4 no, sir.

5 Q. Have you ever thought of asking them that
6 question?

7 A. No, sir.

8 Q. If 800,000 people were alleged to die as
9 a result of smoking, would you have asked the
10 question then?

11 A. No, sir, because I think absent any new
12 scientific information, there isn't any reason for
13 that position to change.

14 Q. So, it would make no difference what the
15 medical community said as to how many people died;
16 you wouldn't ask the question?

17 A. Well, that's not exactly what I said. I
18 said that absent any new scientific break through
19 or information, I don't -- I don't think the policy
20 would change, but then I'm not in a position of
21 making policy either.

22 Q. Well, what type of scientific break
23 through information do you need, Mr. Merryman, to
24 ask the question?

25 A. I need to rely on science really to ask

1 questions. I need to rely on science, for example,
2 to demonstrate how a normally normal healthy cell
3 suddenly becomes malignant. We don't know that, as
4 I understand it from the scientific community.

5 Q. Well, do you know of any reputable
6 medical organization in this country, well, let's
7 start there, which has not stated that cigarette
8 smoking causes lung cancer and other diseases? Do
9 you know of any reputable medical organization?

10 A. I do not.

11 Q. The only organization that so states
12 today is the Tobacco Industry, isn't that right,
13 sir?

14 A. I don't know if we are the only
15 organization that makes that statement; however,
16 clearly we do make that statement. And I think we
17 have support for it in the scientific literature.

18 Q. You can find one article to say anything
19 in the scientific literature, couldn't you?

20 A. I suggest there's more than one article
21 that bears on this controversy, sir.

22 Q. Can you think -- oh, so it is a
23 controversy? Is that what you are saying?

24 A. Oh, yes, sir.

25 Q. Okay. Can you name one organization,

1 forget whether it's a medical organization, one
2 other organization other than the Tobacco Industry
3 which says smoking doesn't cause disease?

4 A. Well, that's not what we say. We don't
5 so say smoking doesn't cause disease. What we say
6 is there's a statistical association between
7 smoking and disease. We don't know if it's a
8 casual relationship.

9 Q. That's --

10 A. To answer your question directly, I don't
11 know who else takes that position, but we certainly
12 do.

13 Q. Well, haven't you searched around to see
14 if you have any allies to support this controversy
15 that you're talking, haven't you done that?

16 A. As I said, our position, I think, is
17 amply supported in the scientific literature. The
18 positions we take certainly do have support there.

19 Q. Mr --

20 A. Whether or not we have allies, as you put
21 it, I don't know that we do.

22 Q. Not one, do you, sir? Not one that you
23 can name; isn't that right?

24 A. We don't have organizations outside the
25 tobacco industry that support our position, if that

1 is your question.

2 Q. Not a single one in the world, do you?

3 A. I'm not aware of any.

4 MR. DUMAS: Mr. Thomas, that concludes
5 it?

6 MR. THOMAS: I believe so.

7 MR. DUMAS: Thank you.

8

9 CROSS-EXAMINATION

10

11 BY MR. DUMAS:

12 Q. Now, during the course of your career
13 from 1976 up to --

14 MR. HARTMAN: I'm sorry. You are going
15 to have show me where you are starting from.

16 MR. DUMAS: 2696. 2696, Line 6.

17 MR. THOMAS: Good morning, Mr. Merryman.
18 How do you start? Where are you?

19 MR. DUMAS: 3349, Mr. Thomas.

20 MR. THOMAS: Yeah.

21 MR. DUMAS: Okay.

22 THE COURT: Ask the question again,
23 please, Mr. Dumas.

24 MR. DUMAS: I have got to find it, Your

25 Honor. We are starting over again. Okay.

1 Volume 17, 3349, line 9.

2 BY MR. DUMAS:

3 Q. Good morning, Mr. Merryman.

4 A. Good morning.

5 Q. Let me ask you first, Mr. Merryman, to
6 tell us a little bit about your background. Where
7 you are from and where did you grow up?

8 A. I was born in and grew up in Rapid City,
9 South Dakota, spent all of my informative years
10 there, went to high school there, graduated from
11 Rapid City Central High School. My mother still
12 lives there.

13 Q. And what did you do after you graduated
14 from high school?

15 A. I attended college in Beloit, Wisconsin,
16 for a year, and transferred to Emerson College in
17 Boston following that.

18 Q. Did you graduate from Emerson?

19 A. Yes, I did.

20 Q. What kind --

21 A. In 1971.

22 Q. What kind of degree did you receive?

23 A. I received a Bachelor's degree in mass
24 communications.

25 Q. And that was 1971, you said?

1 A. Yes, it was.

2 Q. After you graduated in 1997, what did you
3 do?

4 A. I returned to Rapid City to work for a
5 cable television system in their news division,
6 starting up their news department. One of the
7 first cable systems in the country, as I recall, to
8 do any significant amount of news in local public
9 affairs program.

10 Q. And how long did you hold that job?

11 A. I was there for a little less than a
12 year.

13 Q. What did you do next?

14 A. Following that, I went to Sue City, Iowa,
15 where I was employed by the NBC television
16 affiliate there to write and produce and anchor
17 newscasts and do reporting.

18 Q. And how long did you hold that position?

19 A. I was there for a little less than a
20 year.

21 Q. Ad what came next?

22 A. After that, I took a job as news director
23 at the Nebraska Television Network in Carney,
24 Nebraska, which was a commercial network of four
25 television stations that covered predominantly

1 rural areas of Nebraska, Kansas and Colorado.

2 Q. And how long were you in Carney,
3 Nebraska?

4 A. From approximately November 1972 to early
5 1976.

6 Q. So about four years?

7 A. A little less than that, yes.

8 Q. And you left Carney in 1976; is that
9 right?

10 A. That's correct.

11 Q. And what position did you take then?

12 A. That is when the Tobacco Institute
13 offered me a position as assistant to the President
14 of the institute.

15 Q. So, you moved to Washington in 1976 then?

16 A. Yes, sir, I did.

17 Q. Is it fair to describe the five years
18 that you spent before you went to the Tobacco
19 Institute as a broadcast journalist?

20 A. That is correct, yes, sir.

21 Q. Now, tell us how is it that you came
22 about to take a position with the Tobacco
23 Institute?

24 A. Well, I became aware of their interest in
25 hiring someone who was familiar with broadcasting

1 and journalism. A friend of mine who ran a job
2 placement service for the Radio and Television News
3 Directors Association told me of the position. I
4 applied for it. And they asked for a substantial
5 amount of background material on me, which I
6 submitted, and went to Washington then for a
7 personal interview. Subsequently, I was hired.

8 Q. And what were you hired to do?

9 A. I was hired to respond to inquiries from
10 the news media about issues that the Tobacco
11 Institute addressed on behalf its member companies.

12 Q. What kind of media inquiries were you
13 responding to?

14 A. Well, typically, a reporter would call
15 and ask for information on tobacco economics,
16 tobacco history, taxation, smoking bans, smoke and
17 health also on occasion. We responded, if we
18 could, if we had the information to those questions
19 and were in a position of being the spokesman for
20 the industry on those issues on which there was a
21 common position.

22 Q. How did you -- what was the title that
23 you had when you first went to work for TI?

24 A. Assistant to the President, sir.

25 Q. And how did you go about responding to

1 inquiries? What physically did you do?

2 A. Well, we had information at the institute
3 in published form that we referred to, position
4 papers. In terms of economic information, we would
5 gather that from sources such as the U.S.
6 Department of Agriculture.

7 MR. DUMAS: Hold it. Hold it. Hold it.
8 Stop after agriculture.

9 MR. HARTMAN: Sorry. Okay.

10 MR. DUMAS: Go on to the next sentence.

11 MR. HARTMAN: Beginning "we had
12 certainly"?

13 MR. DUMAS: Yes.

14 A. We would certainly review material that
15 came to us in subscription form; for example,
16 magazines and newspapers. So that we had as much
17 information as we could gather on those issues, and
18 also obviously we got a lot of information from our
19 member companies.

20 Q. Did you, during this time that you were
21 Assistant to the President, did you do things other
22 than respond to inquiries from the media?

23 A. Yes, sir. Occasionally I would pitch in
24 to help write a news release. I would write --
25 sometimes I would write speeches for myself. I

1 don't think I wrote speeches for anybody else. We
2 were asked on occasion to give speeches to civic
3 clubs like Kiwanis Clubs and Lions Clubs. Also
4 sometimes tobacco trade magazines would ask us to
5 write an article on a current issue in a magazine,
6 and sometimes I would do that.

7 Q. How long did you hold this position of
8 Assistant to the President?

9 A. In approximately 1980 or '81.

10 Q. And would you tell the jury what position
11 you took up next?

12 A. After that, I was offered a position of
13 Director of Communications at the Institute.

14 Q. And what year was that?

15 A. 1980 or '81, I believe.

16 Q. And did your job responsibilities change
17 when you became Director of Communications?

18 A. Yes, sir, they did. They were expanded
19 quite a bit.

20 Q. And how were they expanded?

21 A. To include some administrative duties to
22 oversee the activities of three other people that
23 would act as spokesman for the institute to the
24 industry, and also a support staff of two people.

25 Q. How long were you Director of

1 Communications?
2 A. For approximately two years.
3 Q. Then what position did you take?
4 A. Then I was offered the position of Vice
5 President of the Tobacco Institute, which I took.
6 Q. And did your responsibilities change when
7 you became a Vice President?
8 A. Not materially, no, sir.
9 Q. And is that the job that you have today?
10 A. Yes, sir, it is.
11 Q. So you have had essentially the same
12 position for the past 15 years approximately?
13 A. Yes, that's right.
14 Q. Are you a part of a particular unit of
15 the Tobacco Institute?
16 A. I'm part of the public affairs division.
17 Q. Public affairs division?
18 A. Yes, sir.
19 Q. And is there anyone in that division to
20 whom you report or are you the head of it? That
21 is, what is -- how does that operate?
22 A. The public affairs division is headed by
23 a senior vice president whose name is Walter
24 Woodson.
25 Q. Can you tell us a little bit about the

1 organization of the Tobacco Institute? Are there
2 divisions other than the public affairs division?

3 A. Yes, sir there are.

4 Q. What are they?

5 A. There are three other divisions. One is
6 the administrative division, which takes care of
7 things like payroll and personnel and computers.
8 There is our state activities division, which
9 oversees our efforts to monitor legislative and
10 regulatory activity of the state and local level.
11 Then there's our federal relations division which
12 oversees our activities at the federal level with
13 respect to Congress and federal agencies.

14 Q. What does the state activities division
15 do?

16 A. The state activities oversees our
17 activity at the state and local level. We have
18 obviously a lot of concerns with respect to
19 legislation and regulatory regulations in the 50
20 states. A lot of legislators are in session right
21 now. We have contract lobbyists who report to
22 various regional vice presidents who represent the
23 Tobacco Institute in Minnesota and other states.

24 Q. When you joined the Tobacco Institute,
25 how many employees did it have?

1 A. I believe there were approximately 30
2 employees at the time, sir.

3 Q. And how many does it have today?

4 A. Somewhere around 50 or 54 employees, I
5 believe.

6 Q. How many are there in the public affairs
7 division, your division?

8 A. The division which I'm employed, I
9 believe there are a dozen.

10 Q. Who supports the Tobacco Institute; that
11 is, provides the funding for the organization?

12 A. Our funding comes entirely from our
13 members which are the cigarette manufacturers,
14 manufacturers of tobacco products.

15 Q. Let me first ask you what this document
16 is, PA000341?

17 A. This is a document which, as it says,
18 it's the scope and activities of the Tobacco
19 Institute. It describes the general terms, what
20 the Tobacco Institute does.

21 Q. And what was the purpose for which this
22 document was prepared?

23 A. We wanted to give people who were
24 interested in knowing something about the institute
25 a general overview of our activities.

1 Q. As an general overview, does it
2 accurately state what the Tobacco Institute does
3 and doesn't do?

4 A. It does, sir.

5 Q. Now, how does it accomplish that aim,
6 that aim or that function of the institute, to
7 foster public understanding? How does it do that?

8 MR. HARTMAN: I'm sorry. You moved.

9 MR. DUMAS: I did. Down about two
10 paragraphs. I'll reread the question.

11 BY MR. DUMAS:

12 Q. Now, how does it accomplish that, that
13 aim or that function, the aim of the institute, to
14 foster public understanding? How does it do that?

15 A. We have a variety of publications that we
16 make available to the news media and the general
17 public on issues that the Tobacco Institute takes a
18 policy or position on.

19 We also have, as I mentioned a moment
20 ago, people like me who act as spokesman for the
21 institute for the industry who are available to
22 talk to the news media or talk to public groups
23 upon invitation.

24 We occasionally have films on
25 agriculture, for example, to give people an

1 overview of what the tobacco agriculture and
2 history is like.

3 And we also maintain documents for our
4 own use in researching some of those issues.

5 Q. Do you, in your job, have occasion to
6 talk with and meet with people who work for other
7 trade organizations?

8 A. Yes, sir, I do.

9 Q. Do you exchange ideas and have
10 conferences and that sort of thing?

11 A. Yes, sir, both formally and informally,
12 we do.

13 Q. Page 3380, 20 pages ahead.

14 MR. THOMAS: That is the extent of ours.

15 MR. DUMAS: Ray.

16 MR. THOMAS: Okay.

17 MR. DUMAS: Do you have that in front of
18 you, Mr. Hartman?

19 MR. HARTMAN: Bottom of the page?

20 MR. DUMAS: Yes. Okay.

21 BY MR. DUMAS:

22 Q. Question: Now, Mr. Ciresi asked you a
23 number of questions about the Tobacco Institute's
24 public statements with regards to smoking and
25 health. Do you remember those questions?

1 A. Yes, sir.

2 Q. Does the Tobacco Institute today in 1998
3 issue press releases or publications dealing with
4 smoking and health?

5 A. No, sir, we don't.

6 Q. How --

7 When did you stop doing that?

8 A. Well, I think the last time I recall we
9 issued anything was in the late 1980s.

10 Q. You would still respond to inquiries from
11 people about the institute's position, if they
12 asked; is that right?

13 A. Yes, sir. If a reporter called and asked
14 for our opinion on a smoking and health issue, if
15 it was something I could respond to, I would.

16 Q. But you don't prepare and issue our own
17 press releases or public statements, and you
18 haven't for several years; is that right?

19 A. That's correct.

20 Q. And why is that? Why don't you do it any
21 more?

22 A. Well, it seemed that there was less and
23 less interest in the subject as the American public
24 believed that smoking caused disease.

25 MR. DUMAS: Thank you.

1 THE COURT: That concludes the reading,
2 Mr. Dumas?

3 MR. DUMAS: Yes.

4 THE COURT: Thank you.

5 Thank you, Mr. Hartman.

6 All right. Mr. Gaylord, Plaintiff's next
7 witness.

8 MR. GAYLORD: Thank you, Your Honor.

9 We call Dr. William Farone.

10 THE COURT: Thank you, sir.

11 Would you step to the witness chair?

12 I'll administer the oath, since the clerk stepped
13 out.

14

15 WILLIAM A. FARONE, PH.D.

16 was thereupon called as a witness on behalf of the

17 Plaintiff and, having been first duly sworn, was

18 examined and testified as follows:

19

20 THE COURT: Have a seat, please. Tell us
21 your full name. Spell the first and the last.

22 THE WITNESS: William Anthony Farone,

23 W-i-l-l-i-a-m F-a-r-o-n-e.

24 THE COURT: Thank you.

25 Mr. Gaylord.

1 MR. GAYLORD: I abbreviated your first
2 name, as I'm used to doing, Dr. Farone. I just
3 wanted to have your name in front of the jury so
4 it would register better than just hearing it.

5
6 DIRECT EXAMINATION

7
8 BY MR. GAYLORD:

9 Q. Let me begin by getting the jury a chance
10 to learn a little bit about who you are in the
11 context of this case. And let's start with a quick
12 overview of your qualifications.

13 I have called you Dr. Farone. Tell the
14 jury what kind of a doctor you are, sir?

15 A. I have a doctor of philosophy in
16 chemistry.

17 Q. And that is a Ph.D.?

18 A. Ph.D.

19 Q. And you are a life-long scientists?

20 A. Probably more true in my case than some,
21 yes. I think I have studied science since I was
22 about nine years old.

23 Q. And we are going to talk, as we go, about
24 your qualifications to call yourself a scientist,
25 about your qualifications that are specific to the

1 issues in this kind of a case.

2 So, let's explain to the jury that you
3 have a particularly relevant experience to a case
4 involving Philip Morris. Summarize for the jury
5 your involvement with Philip Morris?

6 A. I was recruited by Philip Morris in 19 --
7 the late part of 1975, and I joined them in 1976.

8 And for the first year that I worked at
9 Philip Morris I reported to the vice president of
10 research and development, Dr. Robert Seligman.

11 And during that first year I was charged
12 with the responsibility of learning as much as I
13 could about everything that Philip Morris did, how
14 they made cigarettes, how they tested them.

15 The reason I was hired was for two
16 reasons. One was to help them diversify into other
17 businesses. There was a recognition at the time
18 that there was the potential for diminishing sales
19 of cigarettes, due to people's health concerns, and
20 they were interested in diversification.

21 And the other part of the challenge that
22 I accepted was the concept of making a safer
23 product, one that would cause less disease.

24 So, the first year I learned about
25 everything that I could, and then after about a

1 year I was promoted to the position of director of
2 applied research where I supervised a large number
3 of people of different disciplines, and I held that
4 position for seven years.

5 Q. And we'll come back and talk much more
6 about that, but just to kind of again shine a
7 little bit of light on the end of where we are
8 going, and then we'll come back and get there more
9 methodically, you are here in part to share with us
10 a good deal of information from a sort of a
11 in-house view of Philip Morris and its cigarette
12 products and research about those subjects. That
13 is one thing we are going to talk about, is it not?

14 A. That's correct.

15 Q. And then I think you have agreed to share
16 with us some opinions and observations about Philip
17 Morris' conduct with respect to its cigarette
18 products and its customers and views as a scientist
19 and business person about how that fits into the
20 issues in this case?

21 A. That's correct.

22 Q. That is kind of where we are going today.
23 All right. Let's back up then and go a
24 little bit further into the subject of your
25 qualifications to call yourself as a scientist and

1 a chemist.

2 And tell the jury what are the stops
3 along the way that give you that qualification and
4 credentials?

5 A. I graduated -- I'll start with high
6 school, I guess, 1957, North Syracuse High School,
7 second in my class, and that earned me a
8 scholarship to Clarkson University.

9 Q. That is Syracuse, New York?

10 A. Yes.

11 Q. Go ahead?

12 A. Well, actually, it was North Syracuse
13 Central High School, but near Syracuse.

14 And I went to Clarkson University, where
15 I had a major in chemistry, and I did minor in
16 electrical engineering and chemical engineering.

17 And I graduated in 1961 and immediately
18 started my Ph.D. program.

19 And during my undergraduate program, I
20 did a senior thesis in synthetic organic chemistry
21 and studied natural product chemistry, which
22 includes things like nicotine and tobacco and other
23 kinds of alkaloids. Nicotine is an alkaloid. And
24 other types of similar kinds of drugs.

25 In 1962 I completed my Master's degree in

1 chemistry, was awarded a degree in 1963, went on
2 and got my Ph.D. Finished that work in '64. Was
3 awarded my Ph.D. in '65.

4 Between '64 and '65, I worked for the
5 Department of Defense.

6 And in 1965 I became Associate Professor
7 of Chemistry at Virginia State University,
8 Petersburg, Virginia. I was there for two years.

9 Then I joined Leve Brothers Company.
10 Lever Brothers Company is the manufacturer of many
11 consumer products like Close-Up Toothpaste, Aim
12 Toothpaste, Whisk Laundry Detergent, All Detergent,
13 Dove bar soap, Caress, and so on. A very wide
14 range of products.

15 I was involved in their new product area
16 at the beginning of my tenure there. And then I
17 became their director of scientific research
18 responsible for all of the R&D on all of those
19 products.

20 In 1975 I joined a company called Pacific
21 Vegetable Oil Incorporated, PVO International. It
22 was a manufacture of products used in foods that
23 are related to oils and fats and things of that
24 type.

25 And from there I joined Philip Morris,

1 and, as I indicated, in 1976.

2 Q. Okay. Let me just exercise my curiosity
3 about a couple of those things you have told us.

4 Clarkson University is a well-recognized
5 respected university in Upstate New York?

6 A. That's correct.

7 Q. You completed your degree programs there.
8 And you said you went to work for the Defense
9 Department.

10 Give us a short easy way to tell us the
11 general nature of the work you did there?

12 A. Yes. My work was in alkaloid chemistry,
13 had to do with aerosol and things of that type.
14 And part of the work that I was involved in the
15 Defense Department, as well as when I taught
16 college, was in air pollution, the atmospheric
17 aerosol, the stuff that is in the air that we all
18 breath and that we see.

19 One of the interesting projects had to do
20 with measuring ozone profiles. Probably you have
21 heard about the interest in ozone now. Well that
22 goes back to rocket tests that were being made to
23 measure pollution due to ozone back in the early
24 '60s while I was at White Sands.

25 Q. That is White Sands, Mexico?

1 A. Right.

2 Q. You used a word aerosol. And I'm sure
3 we'll hear more about that word. So why don't I
4 have you explain it to the jury? It's a term we
5 hear as lay people, but I suspect it has a
6 technical meaning, as well.

7 A. Aerosol is a system where you have tiny
8 droplets in a gas. Normally, the one we are
9 talking about is an aerosol where the droplets are
10 liquid. They may have some solid materials
11 dissolved in them. And in between these particles
12 of liquid droplets, which can be very small, we
13 have gas or air. And the chemical composition of
14 the aerosol droplets can be different from the
15 chemical composition of the air in gas.

16 Q. I think because there is a lot of
17 terminology that may come up, not by any means all
18 of the words that you use, but for a few of them,
19 I'm going to ask you to write the word so we can
20 see it, and maybe it will register better when we
21 hear it again. Will you write it, please?

22 A. Aerosol. And if we think of aerosol as
23 being different sized drops.

24 Q. Now, you know what I'm going to have do?
25 I'm going to have to have you out here because we

1 are getting down behind this thing. All right.

2 THE COURT: Mr. Gaylord, it's perfectly
3 fine to put the back of the witness to me. I
4 don't need to see the drawing. The jurors do.

5 MR. GAYLORD: I appreciate that.

6 THE COURT: And if counsel can see it,
7 too.

8 MR. GAYLORD: Thank you, Your Honor. I'm
9 not sure exactly how to meet all of those
10 criteria, but just for -- let's go with this for
11 the moment.

12 THE WITNESS: Okay.

13 So, we have these droplets, and they can
14 be caused by a lot of things. Like fog is an
15 aerosol. I have noticed some here. But the
16 tobacco smoke is also an aerosol.

17 While I was at Lever Brothers, products
18 like hair spray, things of that type, underarm
19 deodorant, those are all aerosols.

20 And the usual interest in aerosol is the
21 particle size distribution. That is how many
22 particles you have of different type. And also
23 what it's composed of.

24 So, there is a gas in between, and
25 there's droplets, which in most of the one of

1 interest are liquid droplets. And there can be
2 dissolved solids inside the liquid droplets.

3 Q. Now, Doctor, once again, I'm going to
4 interrupt where you are going with that. I think
5 aerosol is going to be a word we are going to hear
6 more about. And this may be something that you'll
7 expand on. But I sort of stepped off the track.
8 There's some things I need to do in terms of
9 completing your qualifications.

10 So you worked at White Sands, New Mexico
11 with the Defense Department on a subject that dealt
12 with aerosol as one of its aspects.

13 I haven't asked you and you haven't
14 really talked yet about your work in education.
15 You have been an educator of scientists?

16 A. I was Associate Professor of Chemistry at
17 Virginia State University for two years.

18 Q. All right. And have you continued to
19 think of yourself as an educator of scientists
20 throughout your career?

21 A. I have actually maintained some teaching
22 experience with national university, teaching night
23 school. And I have had students. For example, a
24 few years ago I had a student at the University of
25 California at Santa Barbara, even though my current

1 company I'm not teaching academic subjects anymore,
2 but I do help students on their Ph.D. or Master's
3 thesis by being what we call an outside advisor to
4 them.

5 Q. Now, you have, as a scientist, you had
6 occasion to contribute technical publications in
7 articles that were reviewed and accepted and
8 published and became part of the literature in your
9 areas of expertise?

10 A. Yes, I have. I don't know. I don't keep
11 the exact number, but somewhere around 50 technical
12 publications and patents.

13 Q. And you have patents of your own and have
14 been involved in patent work with companies, as
15 well?

16 A. Yes, I have.

17 Q. The company you mentioned -- let's see
18 which one was first? Was Lever Brothers before
19 PVO?

20 A. Yes.

21 Q. Okay. Let's talk about Lever Brothers
22 just for a moment again. You said that is a
23 company that makes many consumer products, and we
24 have heard of those.

25 A. That's correct.

1 Q. And you spent how many years at Lever
2 Brothers?

3 A. 1967 to '75, eight years.

4 Q. Okay. And your final position there was?

5 A. Director of scientific research.

6 Q. Okay. And just as it sounds like, that
7 means you were in charge of that whole aspect of
8 the businesses?

9 A. I was in charge of the physical
10 chemistry, organic chemistry, toxicology, and that
11 included all of the safety testing. Microbiology,
12 which includes things like bacteria, molds, and
13 yeasts that might be in food products.
14 Biochemistry. All of the scientific.

15 Q. Now you have just named several different
16 kinds of scientists. And I didn't hear you say
17 that your Ph.D. includes all of those different
18 things?

19 A. Well, the discipline in which I studied,
20 keloid chemistry is one of the cross over
21 disciplines. We are actually technically referred
22 to as physical chemist which is a combination of
23 physics and chemistry.

24 And I guess the best way to explain it
25 was a very famous American scientists Gilbert

1 Norton Lewis who once described physical chemistry
2 as the science of everything that is interesting
3 and it doesn't include anything that isn't
4 interesting.

5 And basically what you study is
6 applicable to life processes. And it's applicable
7 to wood or metal. It's a physical chemical basic
8 thing. So that allows you to apply it to the life
9 sciences.

10 Because of that background I was selected
11 at Lever to also be in charge of the life sciences.

12 Q. And those various different disciplines
13 of sciences that you mentioned at Lever Brothers,
14 were those positions essentially -- do those titles
15 represent positions that were occupied by other
16 scientists who worked under your supervision while
17 you were there?

18 A. Yes, they did. For example, in the
19 toxicology area, there would be the head person of
20 that division would be a toxicologist, and they
21 would have five or six toxicologist below them.
22 There would be technicians who would do animal
23 testing, pathology, things of that type.

24 And in analytical chemistry there might
25 be 50 analytical chemists who do chemical analysis

1 on products, and so on.

2 Q. Okay. This part of your career that was
3 at Lever Brothers, did you have an opportunity to
4 work on either improvements or developments of new
5 products that involved numerous consumer products
6 that we have all heard of?

7 A. Yes, I did. For example, I was involved
8 when I first went there I wasn't director of
9 research. I was a scientist and was involved in
10 the product Close-Up Toothpaste, which people may
11 be familiar with. It was the first silica-based
12 toothpaste, made of little tiny particles of sand,
13 actually. And the object was that this was
14 considered to be superior to the jell toothpastes.
15 So that became the basis for Aim toothpaste. Aim
16 toothpaste is a drug, whereas Close-Up toothpaste
17 at that point was considered not, because it
18 contained fluoride.

19 And so I was involved in actually the
20 development of a product where that change was made
21 of adding fluoride in clinical trials and going
22 through all of the things with making sure that it
23 was safe, making sure that it was effective.

24 And similar with Promise margarine. You
25 may have heard of Promise margarine. We had

1 another margarine called Imperial margarine, and
2 because of the association between fat and
3 cholesterol and saturated fat in your diet and
4 cholesterol, we decided to make the highest
5 polyunsaturated margarine that we could. And that
6 turned out to be the Safflower product. And we had
7 to do the clinical trials on that to make sure that
8 we achieved cholesterol lowering. Some of it was
9 pretty mundane.

10 You have probably all seen the Ring
11 Around the Collar commercial for Whisk. So,
12 sometimes your science is directed toward proving
13 an advertising.

14 Q. Okay. Proving that Whisk gets the ring
15 out from the collar?

16 A. That's correct.

17 Q. Okay. Would it be fair to say that in
18 your career, including Lever Brothers, you have
19 functioned as a scientist but also as a manager?

20 A. Well, actually probably a manager. It's
21 difficult to define in a scientific discipline.
22 You work with people and they work for you. I
23 mean, it's sort of a two-way street.

24 In my career, I have tried to maintain
25 what we call a hands-on involvement in the science.

1 So, I have continued to publish, and I look at the
2 people who work for me more as colleges than I do
3 as subordinates. And it's pretty competent
4 science, that don't have these very strict boss
5 subordinates relationships.

6 Q. But while you were at Lever Brothers and
7 working on some of these things, you mentioned like
8 you were the guy that many of these other people
9 were working for and reporting to. You probably
10 weren't there with the beakers and Bunsen burners?

11 A. That's correct. I had 150 people
12 reporting to me at Lever I was responsible for. I
13 was the senior signatory for the company on all of
14 the applications and submissions to government
15 regulatory agencies. I really had the managers
16 reporting to me.

17 Below them there was a project leader,
18 who was reporting to managers, and then below them
19 the scientists who actually did the work.

20 But I did also maintain my own
21 laboratory, and I also did my own hands-on work at
22 the same time.

23 Q. All right. And in that kind of a program
24 would you have developed and used a strong
25 awareness of things like standards of

1 responsibility for a manufacturing company?

2 A. Well, as a matter of fact, it's probably
3 more severe than that. Because it was my name that
4 was going on the approval list for everything we
5 did, so it was important that not only that I
6 understood the standards but I also understood the
7 criteria by which those regulations of all of those
8 different products were going to be interpreted.
9 We had to deal with the Environmental Protection
10 Agency, the Consumer Products Safety Commission,
11 the Food and Drug Administration, and various
12 state -- every state has their own safety people
13 for like foods and agricultural products, and we
14 had to deal with all of that.

15 So we had a special staff of people that
16 would go to those meetings with those people all of
17 the time.

18 Q. From your experience there and your other
19 careers positions, are you a person who knows and
20 understands not only formalized codified standards
21 of behavior for products and companies, but also
22 what we might think of as the common law or
23 unwritten rules for why what is reasonable behavior
24 for companies?

25 A. Well, there is in companies and there's

1 also in science, there's also a code of ethics for
2 science.

3 Q. And are all of those subjects within your
4 knowledge and experience?

5 A. Yes.

6 Q. From the education and from the work you
7 have done?

8 A. Yes, they have.

9 Q. We'll probably get to the application of
10 those parts of your expertise. You went from Lever
11 Brothers PVO, which you said was Pacific Vegetable
12 Oil?

13 A. That's correct.

14 Q. Okay. Now, just because that name might
15 suggest something fairly simple and low-tech, I'm
16 going to ask you is that a correct impression or --

17 A. No, that is not a correct impression.

18 Oil or fat products are used in
19 production of a wide variety of materials, in
20 addition to foods. You know, for example, they are
21 used in paints. There's resins made from fats.
22 There is lubricants made from fats. There are
23 various kinds of esters that are used as food and
24 fragrance additives that are made from fat.

25 So, although we were dealing with

1 vegetable oils and things of that type, it was
2 really a chemical company where we were turning
3 those kinds of products into other chemicals which
4 had a wide variety of uses in foods, cosmetics,
5 toiletries, industrial applications.

6 Q. Now, I'm going to skip over Philip Morris
7 for a moment in the chronology of your career
8 because we are going to spend more time on that.

9 After you left Philip Morris, you
10 continued to work as a scientist and in the
11 industry?

12 A. Yes. I have been president of two
13 companies. The first one was called Advanced
14 Scientific Applications, which was formed in 1984.
15 And the major client we had there was Dean Wittier
16 Reynolds at that time. Now Morgan, Stanley, Dean
17 Wittier. That is an investment banking firm. And
18 we were involved in helping them understand the
19 various projects that they got involved in,
20 involving things like wind energy, bio mass
21 conversion. Things like ethanol production for
22 alternative fuels.

23 And in 1987 formed the current company of
24 which I'm president and chief executive officer.
25 It's called Applied Power Concepts, Inc. And it's

1 a -- we do three things. We develop new technology
2 in energy, biochemistry, and chemistry. And the
3 common thread is that the things that we're doing
4 are intended to be environmentally more acceptable
5 than the standard way of doing things. So, we
6 develop, for example, chemicals that might replace
7 insecticides that are harmful or chemicals that
8 might replace biocides that are harmful or a
9 cleaning agent. So they are all food-derived
10 chemicals to replace chemicals that are being used.

11 Q. You said biocide. What's a biocide?

12 A. A biocide kills bacteria, yeasts, molds.
13 You could use it to clean your shower stall or a
14 spray in a hospital, on a cleaning surface. And we
15 have just developed and applied to the EPA for a
16 product that does that. But within four hours it
17 breaks down into things which are harmless.

18 Q. And you said food-derived products. And
19 I don't picture that you go down to the food court
20 and buy stuff and turn it into other kinds of
21 products. But tell us what that means?

22 A. Well, the insecticide we developed is a
23 sugar estrin. It is an ester of sucrose and fatty
24 acid, and you put those together and you can spray
25 it on an aphid or a wet fly and what happens is it

1 dewaxes them so they essentially dry out and die.
2 But on the other hand it's something you can eat
3 because it's just sugar and fat. So, if you eat
4 it, it's okay -- not the fly.

5 And so, for example, the hard surface
6 cleaning agent that we have, that kills the
7 bacteria, the yeast and the mold, but when you put
8 it into water it's only got about four hours before
9 it breaks into two pieces, one of which is a thing
10 called glycine B-tain, which is a byproduct of
11 sugar beet and which is what we start with, and the
12 other is another fatty acid driver.

13 So, it's pretty simple, the idea to take
14 these things which are less harmful, put them
15 together and make something replacing something
16 that is harmful.

17 Q. Where is your current home and business?

18 A. My home is in Irvine, California. The
19 business is in Orange, California, about five
20 minutes from Disneyland.

21 Q. And that is a going concern and keeps you
22 busy and would keep you plenty busy without having
23 to be in places like this doing things like this?

24 A. That's correct.

25 Q. Let me then go back and now talk about

1 Philip Morris and your involvement there, and --
2 THE COURT: Mr. Gaylord.
3 MR. GAYLORD: Yes.
4 THE COURT: Can I interrupt? We are
5 going to need a morning recess, particularly for
6 the reporter who's been going since 8:30.
7 MR. GAYLORD: Sure.
8 THE COURT: At any point, before you get
9 into something where you are going to be going
10 with the same topic for awhile.
11 MR. GAYLORD: We are about to do that,
12 and maybe this would be just as good as any.
13 THE COURT: Jurors, 15 minutes, please.
14 * * *
15 (Whereupon, after the jury exited the courtroom,
16 the proceedings continued, as follows:)
17 * * *
18 THE COURT: Thank you.
19 Anything for the record for the
20 Plaintiffs?
21 MR. GAYLORD: No, Your Honor.
22 THE COURT: Mr. Cofer.
23 MR. COFER: Yes, Your Honor.
24 If Dr. Farone intends to offer opinions
25 on the common law of business ethics, I'm going

1 to want to object to that, and I don't know how
2 Your Honor would like to take that up, whether
3 that is something we should do when and if that
4 happens or whether you would prefer to deal with
5 that in advance.

6 And the basis of my objections would be
7 to lack of foundation, it invades the province of
8 the jury, and it's not a proper subject of expert
9 testimony.

10 THE COURT: Go ahead. Are we going
11 there?

12 MR. GAYLORD: Well, I think we are going
13 to ask this person at some point what he opines
14 about the standard of reasonable care for a
15 company manufacturing consumer products. If that
16 isn't a subject for expert testimony, I'm going
17 to throw away my set of Oregon Reports.

18 THE COURT: Go ahead, Mr. Cofer.

19 MR. COFER: Well, I would tell him to
20 start tossing them --

21 THE COURT: Oh, now, come on, both of
22 you. It's all right. I just, you know, I know
23 he started and you finished, but let's not go
24 there. Okay.

25 MR. COFER: It's the sixth grade boy

1 thing.

2 THE COURT: I'm not going to be a
3 teacher. So let's just say to the merits.

4 MR. COFER: That is for the jury to
5 decide. In fact, one of the ultimate issues in
6 this case is whether Philip Morris departed from
7 the ordinary standard of care, whether it acted
8 as a reasonable manufacturer.

9 A chemist, who is a former employee at
10 Philip Morris, is not qualified to render that
11 opinion. I'm not sure that anyone is qualified
12 to render that opinion.

13 Perhaps if there was some business
14 ethicist who established there was some sort of
15 protocol recognized within the particular
16 community could set out the different standards,
17 why they were recognized, that could be subject
18 to cross-examination perhaps, and give that
19 opinion, but for someone just to come in and say:
20 I'm a business person; I'm as a scientist; I used
21 to work at Philip Morris; in my opinion, they
22 departed from the reason and standard of care.
23 That invades the province of the jury.

24 This person is not qualified to give that
25 opinion. And it's not the proper subject of

1 expert testimony.

2 THE COURT: Well, let me start with the
3 last conclusion because I think that is a
4 conclusion I can't draw yet, and I'll want to
5 hear the foundation laid.

6 It's not at all unusual that expert
7 witnesses offer opinions about the standard of
8 care in a particular field relative to a claim
9 for negligence. The most observe one, obviously,
10 is in the area of medicine where jurors are being
11 asked to determine whether a defendant
12 physician's conduct fell below the standard of
13 care. That is what negligence is. They need
14 help to do that.

15 And it is helpful to the trier of fact
16 when someone qualified who is familiar with the
17 standard of care states what that standard is.

18 And then often it is then asked of such a
19 witness whether the assumed conduct of the
20 defendant physician fell below that standard.

21 Indeed, a plaintiff can't get to a jury
22 in a medical malpractice case, at least in our
23 state, without that kind of prime facie evidence.

24 There is a claim in this case that Philip
25 Morris's conduct was negligent. There is going

1 to have to be some evidence about the standard of
2 care of a reasonably careful cigarette
3 manufacturer relative to those claims of
4 negligence.

5 Whether this witness is qualified to
6 offer an opinion about that standard of care
7 depends upon the foundation laid. And,
8 obviously, we haven't gotten there yet.

9 But I can't say that just preemptively
10 that kind of opinion evidence invades the
11 province of a jury or is not the proper subject
12 of expert testimony because it often is.

13 In many areas, a car A-car B case, where
14 jurors are familiar with the rules of the road,
15 they don't need an expert witness to tell them
16 what conduct is reasonable or what is a lack of
17 due care.

18 But in a case like this, I suspect they
19 are going to need some reference beyond their own
20 experience about what is the conduct of a
21 reasonably careful cigarette manufacturer and
22 what conduct falls below that, in order to create
23 an issue of fact.

24 So, it's appropriate for the Plaintiff to
25 lay that foundation. I'm not going to require it

1 to happen outside the presence of the jury.

2 When you are ready to make your
3 objection, let me know, and we'll take discussion
4 behind the jury's doors, that is, to say, into
5 chambers, and we'll finish the record there.

6 But I don't see a reason not to allow it.
7 They need to have an opportunity to try to make
8 their case.

9 MR. COFER: I wanted to flag the issue
10 for the Court.

11 THE COURT: No, I appreciate that.

12 MR. COFER: And I'll make the appropriate
13 objection.

14 THE COURT: Okay. Were you rising also?
15 I saw some body language?

16 MR. DUMAS: I think I was going to, but I
17 don't think that is necessary at this point in
18 time.

19 THE COURT: Okay. I just wanted to make
20 sure everybody said what they need to say for
21 now.

22 15 minutes, please.

23 * * *

24 (Whereupon, after a recess, the proceedings
25 continued in open court, in the presence

1 of the jury, as follows:)

2 * * *

3 THE COURT: Jurors, assuming there's no
4 problem for you, we are going to go until about
5 12:15. All right. Okay. Sounds good.

6 Mr. Gaylord.

7 MR. GAYLORD: Thank you, Your Honor.

8 BY MR. GAYLORD:

9 Q. Dr. Farone, to sort of overcome this
10 problem of something for you to write on, when that
11 is appropriate, and not have it be blocking the
12 place have where you sit in the witness box, I'm
13 going you have you, when we get to that, to use the
14 door presenter, and if the jury can see it on the
15 TV when that's appropriate. There we were.

16 Let's -- we are just about to move into a
17 little more detailed expression of your career at
18 Philip Morris. You told us earlier something about
19 how it happened that you went there. But will you
20 start with that and tell the jury how and why you
21 were, to use your word, recruited?

22 A. Yes.

23 Q. Is that a fair description?

24 A. Yes. I was recruited by an executive
25 search firm, and I interviewed both at the

1 headquarters, first in New York City, and then at
2 the Research and Development Center in Richmond,
3 Virginia. Interviewed with Dr. Robert B. Seligman
4 and Mr. Clifford Goldsmith in New York, and then in
5 Richmond with Dr. Helmut Wakeham, Mr. Frank
6 Resnick, Dr. Tom Osdene, Dr. Walter Ganon, and Dr.
7 William Dunn.

8 And, again, the job opportunity was to
9 join them and with the ultimate understanding that
10 I would become a director of research of some type
11 with two missions in mind: Mission No. 1 was a
12 diversification into areas other than tobacco which
13 Philip Morris was interested in at that time; and
14 the second was the development of the safer
15 product.

16 Q. Now, you used the word recruited, and
17 that would imply, I guess, that you weren't going
18 there looking for a job; they came to you?

19 A. The executive search firm was -- I don't
20 really know how to say it -- Hydrix or Hindrix &
21 Struggles. I remember because of Struggles. But
22 it's a well-known recruiting firm. And I was
23 called, and for a little while I didn't know. Of
24 course, when you get those calls, you don't know
25 who the company was. I knew it was tobacco. And

1 as you goes on, you eventually find out more and
2 more about the job. But they came after me.

3 Q. Okay. Now, you have named a number of
4 people, and I think, just to get some orientation
5 of them, I'm going to ask you to step down to the
6 presenter, and see if I can make this -- this is
7 Plaintiff's Exhibit 105. And I'm going to see how
8 well I can get it positioned on the viewer so that
9 you can show the jury at least some of the names
10 that you have just listed. This is really not --
11 let's see. I'm not sure which direction has a
12 better focus.

13 Well, the title of this document is
14 Research and Development Department.

15 MR. COFER: That is better.

16 MR. GAYLORD: Can I ask the jury if I'm
17 focussing at all, Your Honor? I can't tell where
18 I am.

19 JURORS: Getting better.

20 BY MR. GAYLORD:

21 Q. Are you familiar with this document?

22 A. Yes, I am.

23 Q. Okay. Why don't you just circle on the
24 document some of the names that you have just been
25 mentioning and what it is?

1 It's a chart organization, but of what
2 part of the company?

3 A. This is a chart organization of the
4 research and development department. Looking at
5 this document, its approximate vintage is '78 or
6 '79. It says '79 on the bottom here. And the
7 person that I interviewed in New York who later
8 became the vice president of R&D is here, Robert G.
9 Seligman. Dr. Wakeham at that time was corporate
10 vice president of science and technology, but at
11 the time I first interviewed he was the out-going
12 vice president of R&D. Dr. Seligman actually came
13 in and replaced him.

14 This is after my first year -- actually,
15 it's in the third year. So, I had already become
16 director of applied research, but the other two
17 people that I mentioned was Dr. Thomas S. Osdene,
18 director of research on this chart, who I
19 interviewed. And Dr. Walter F. Ganon, who is the
20 director of development at this time.

21 THE COURT: Mr. Gaylord, the exhibit
22 needs to be moved up.

23 THE WITNESS: So, Dr. Walter F. Ganon is
24 here. Dr. Thomas S. Osdene, here, as director of
25 research. And this is my name in this box.

1 I'm looking for and I don't see on this
2 particular chart Dr. Dunn, but he had a staff
3 position reporting to Dr. Osdene. He was the
4 company psychologist.

5 BY MR. GAYLORD:

6 Q. Let's show you one of the subparts of
7 Exhibit 105, just to answer the question you have
8 just raised. This is a part of the larger research
9 department that is Dr. Osdene was the director of,
10 is it not?

11 A. That's right. And this is Thomas S.
12 Osdene, director, and here is Dr. Dunn, who I also
13 interviewed, reporting to Dr. Osdene.

14 Q. Okay. And so the relationship between
15 these two charts is that the first one is the
16 larger picture and then, if we focus in on the
17 Osdene part of that, we get the second chart?

18 A. Correct.

19 Q. Okay. While we're at that, let's show
20 where you fit and in a closer view. Okay.
21 Dr. Osdene's subheading was research and yours was
22 applied research?

23 A. That's correct. At this time, 1979, I
24 was director of applied research.

25 Q. That is a little high.

1 A. I had three staff scientists, Dr. Lowitz,
2 Dr. Lilly, and Dave Clark. And there were three
3 divisions: The biomaterial science division, which
4 had to do with tobacco and all kinds of tobacco
5 technology; computer applications, where we applied
6 the computer to various problems that we had. For
7 example, in modeling and calculating how various
8 components are delivered when you smoke a
9 cigarette. And Dr. Desman was the manager of the
10 physical research division, which studied physical
11 properties of like the cigarette smoke and the
12 cigarette itself.

13 Q. Just while we have these items in front
14 of the jury, again. Dr. Osdene's director of
15 research and Dr. Dunn, as a subunit of that.

16 Is Dr. Dunn the person that we have heard
17 of as being referred to as the nicotine kid?

18 A. Yes.

19 Q. There are other names in here that may be
20 of interest and other evidence that the jury has
21 heard. But, at least as of this October '79 date,
22 all of those names should be locatable within this
23 set of documents that is Exhibit 105?

24 A. As far as I know, yes.

25 Q. Okay.

1 Now, what was about it, the approach that
2 Philip Morris made to you, through recruiters, that
3 interested you or attracted you to become a
4 scientist at Philip Morris?

5 A. Well, it was a very challenging
6 opportunity at this point. Obviously, it's a
7 company that has great resources, and one of the
8 things that I was impressed by was their
9 understanding of the problem that they faced.

10 They were concerned about not being in
11 business, as may be not being in that business on a
12 short time scale of maybe 10 to 20 years, that
13 business being selling cigarettes.

14 The second part of it is that there was
15 an understanding that their product needed to be
16 made safer. And they were putting great effort to
17 that end. So it seemed like a worth-while thing to
18 do, help them in those endeavors.

19 Q. Now, I want to focus on one of the things
20 you just said, not being in that business and you
21 said some years. Were their indications made to
22 you in this time period when you're being recruited
23 that Philip Morris had some expectations about a
24 limited life expectancy to the cigarette?

25 A. Yes. The Philip Morris concern was that

1 there was greater concerned over smoking and health
2 that their sales would decrease over time, and they
3 could not depend on cigarette sales as being the
4 main business. And so there was active interest in
5 going out and acquiring other companies to make a
6 larger company so if the cigarette sales would
7 decrease they would still be in business.

8 Q. And the part of the attraction to you
9 that you have mentioned about diversification, did
10 that have to do with this idea that Philip Morris
11 was going to be a bigger company with a broader
12 range of products and needed somebody with
13 expertise in analyzing and in doing technology of
14 those products?

15 A. Well, the way I it was explained to me,
16 because of my background with Lever Brothers, being
17 with all of these other consumer products, that if
18 they were diversified into the consumer products
19 area that I would be very helpful to them in
20 understanding which companies to acquire and toward
21 helping them evaluate the technology that those
22 companies might have.

23 In fact, I did that for Lever Brothers.
24 Lever Brothers was owned by Unilever, which is an
25 Anglo-Dutch company that owns Lever Brothers U.S,

1 and I had helped them determine what companies they
2 should acquire and what technologies those
3 companies had.

4 So that was one of the reasons given to
5 me for being interested in my background.

6 Q. Now, did you go to Philip Morris with an
7 expectation about the position that was going to be
8 yours sooner or later after you got there?

9 A. Yes. I was told that they wanted to have
10 me spend some period of time learning about how
11 cigarettes are made and all of the technology
12 involved from their perspective as an employee, and
13 that after that time I would become director. And,
14 as I understood it, gradually Dr. Osdene's
15 responsibilities would be decreased so that he
16 could focus more specifically on smoking and
17 health.

18 Q. Now, we have seen only these charts, a
19 couple of different titles. It sounds like they
20 might overlap. I wonder if you could just explain
21 how those territories were defined; that is
22 Dr. Osdene was the director of research, and you
23 were to become director or applied research. What
24 was the line between those?

25 A. In the beginning, the line was physical

1 chemistry, physics, bio-materials, the properties
2 in tobacco. Then it gradually shifted. I
3 gradually obtained responsibility for the
4 analytical chemistry and organic chemistry.

5 Dr. Osdene was focussed on the biological
6 testing of which there were two types. One is cell
7 level testing that was done in house at Philip
8 Morris in our research building. Such things like
9 mutagenicity and testing the cell levels where you
10 look at the effect of tobacco smoke and/or
11 components of tobacco smoke, as they might affect
12 bacteria or hamster cells or some other kind of
13 cells, called cell-level testing, also sometimes
14 referred to as in vitro testing. It's not a living
15 system.

16 The other part of the testing he was
17 responsible for was called vivo testing, where they
18 do animals and testing the animals and that was
19 carried out in Europe.

20 Q. Okay. We'll get back to that in a little
21 while. I kind of wanted to get the basics of what
22 was Dr. Osdene's coverage and what was yours.

23 Sounds like testing, in the sense of the
24 safety and science of tobacco smoke, to the extent
25 that it was being done in house at Philip Morris,

1 it was in Dr. Osdene's department?

2 A. Yes. He was involved in the safety
3 testing of the product.

4 Q. And how was applied research defined as
5 it became your director?

6 A. Well, we developed the things that trying
7 to look at it one simple way that he might test.
8 For example, we had products projects to decrease
9 carbon monoxide, to decrease some of the
10 carcinogens. One of the great carcinogens of
11 concern is a class of chemicals referred to as
12 tobacco specific nitrosamines, and these come about
13 because of the interaction of the alkaloids, like
14 nicotine, with nitrates that are being burned.
15 Nitrates in tobacco are there because of over
16 fertilization and being picked up by the plant.

17 When you burn nitrates it makes oxides of
18 nitrogen, which then react with the nicotine and
19 the other alkaloids in tobacco to make those
20 tobacco-specific nitrosamines.

21 So, we had projects, for example, to
22 reduce nitrates. If you reduce nitrates you would
23 reduce tobacco-specific nitrosamines. You would
24 also reduce oxides of nitrogen, which are not good.
25 That is a common air pollutant. And we had

1 projects to filter out the tobacco-specific
2 nitrosamines after they were made.

3 So we did the physics and chemistry, and
4 then he would test the products containing those
5 changes to see if it made an improvement.

6 Q. Okay. I'm going to -- you have just
7 thrown a whole bunch of terminology at us, and I'm
8 going to ask you to find a place in front of the
9 jury where the jury can see it. Just write down a
10 few of those terms that I think are fairly large
11 ones on the subject.

12 But to recap what you have just covered,
13 in terms of distinction between your part and Dr.
14 Osdene's part, is the -- are the projects that you
15 described that were under supervision projects in
16 pursuit of that second goal of yours when you came
17 to the company; that is to say the opportunity of
18 to make a safer product?

19 A. Yes. And over the period of time I have
20 estimated that about 80 percent of my time was
21 actually spent in pursuing the second goal, the
22 safer product, and about 20 percent in the merger
23 acquisition area.

24 Q. Okay. There was an 80-20 mix between the
25 two goals that they hired you for, essentially?

1 A. That's correct.

2 Q. All right. You said a number of things,
3 and I'm going to ask you to make use of the pen and
4 show us, with a few words, the subject areas. You
5 described Dr. Osdene's group. You said cell-level
6 testing, and you used the word mutagenicity?

7 A. Correct.

8 Q. Maybe write that word down and tell you
9 us what that has got to do with anything.

10 A. Mutagenicity is the mutation that is
11 caused at the cell level in a cell when it is
12 divided. It changes. It deviates from the genetic
13 information encoded in the DNA. It does something
14 different than it did the last time the cell
15 divided.

16 There's carcinogenicity.

17 And then there's Teratogenicity, which I
18 always have trouble spelling. Those are the three
19 genicities, if you will.

20 And teratogenicity is more like a problem
21 that occurs in the next generation of offspring, a
22 change in a cell that doesn't show up until some
23 future generation of cell division.

24 Carcinogenicity also obviously is cancer.
25 It's a wild growth of cells uncontrolled.

1 Mutagenicity simply implies a change.

2 The normal thing that happens is you have a mutagen
3 causing mutation and that leads to carcinogenicity.

4 Q. Okay. Is that a way of saying when that
5 when a living organism has cells that will multiply
6 and divide, mutagenicity is when something goes
7 wrong in that process?

8 A. Mutagenicity is the first link of
9 something goes wrong. The cell mutates, and then
10 it becomes carcinogenic, when it undergoes wild
11 uncontrolled growth, taking over the organism.

12 Q. So, carcinogenesis is a particular kind of
13 mutation?

14 A. Well, no. The mutations lead to the
15 carcinogenesis.

16 Q. Okay. Now, what I think I want to ask
17 you about on this subject, before we get back to
18 some words related to what you told us about, your
19 subject, you are a director.

20 When you went to work for Philip Morris,
21 the first thing you had to do was learn about that
22 business.

23 A. Correct.

24 Q. I'm not right now going to ask you, but
25 you learned about the process of making cigarettes.

1 We'll go into that. But did you learn a kind of
2 new vocabulary in terms of what were the words used
3 and the concepts shared among the scientists at
4 Philip Morris about their products?

5 A. Yes, I did.

6 Q. Describe for the jury -- before I do
7 that, let me ask you this. We have seen a chart
8 that shows you have got directorate, Dr. Osdene has
9 a directorate. There are other subdirectorates and
10 subbranches to this part of the Philip Morris
11 corporation.

12 Were you and Dr. Osdene and the people
13 working for each of you separate worlds or how was
14 the -- what was the working relationship, if any,
15 between your people and his people?

16 A. Not entirely separate worlds. As I said,
17 we had -- the people working for me had no ability
18 to do safety testing on the changes that we were
19 making. So we would provide either information on
20 what changes to be made to Dr. Ganon who might try
21 to make them or we would provide examples of those
22 changes prototype the products to Dr. Osdene, and
23 he then would have them tested. And then we would
24 have joint meetings where the results of those,
25 those pieces of information might be shared. And

1 in some cases we never would find out what the
2 answer was.

3 But Dr. Osdene was in charge of doing
4 that kind of testing. So we had a working
5 relationship, and then some the other projects, for
6 example, on carbon monoxide production we actually
7 had a task force put together. So, some people who
8 worked for me, some people who worked for
9 Dr. Osdene, some from Dr. Ganon's area, and we
10 would all work on the project.

11 Q. Okay. Now with respect to you
12 personally, in your working relationship with other
13 parts of this research organization, when you went
14 to work there, did you become acquainted with all
15 of your colleges?

16 A. Yes, I did.

17 Q. Did you spend time for the express
18 purpose of learning those people and learning what
19 they were doing?

20 A. Yes. I mean, during my first year,
21 particularly, I visited -- well, there were some
22 secret off-limits areas, but, other than those, I
23 talked with all of the division managers, and that
24 sort of thing. Met with the people. Learned the
25 projects.

1 I attended -- we used to have meetings,
2 weekly meetings where every project would be
3 reviewed on a weekly basis, and that continued for
4 the entire eight years I was there.

5 So all of the non-secret projects, and
6 there were several secret ones, they would be
7 reviewed on a weekly basis.

8 And then I would talk to those people. I
9 also toured all of the plants. I toured the
10 manufacturing center where the cigarettes were
11 made.

12 And then we also had facilities that made
13 materials that went into the cigarette. These are
14 places where we took, for example, scraps and
15 pieces of tobacco and put them into sheet materials
16 that look a little bit like tobacco. Used those in
17 cigarettes.

18 We had a facility that took tobacco and
19 puffed it up, expanded it back. When you cut
20 tobacco and you chop it up, and it dries out, it
21 kind of shrivels up. And Philip Morris and all of
22 the other companies had technology that allowed
23 them to puff that back up, called expanded tobacco.

24 Q. Let me, if I may, interrupt you again.
25 I'm going to come back to what you referenced about

1 the processing and the manufacturing part of the
2 business. But right now, so I don't you forget to
3 do it, I want to stop on a topic and ask you about
4 this.

5 Based on your orientation of yourself to
6 the Philip Morris cigarette business and your
7 meeting and talking to the other scientists in the
8 part of the business you went to work for, did you
9 develop an understanding about the position of the
10 Philip Morris scientists, in general, on the
11 question of relationship between smoking cigarettes
12 and lung cancer?

13 A. I did.

14 Q. Tell the jury what you learned about that
15 understanding or position of the scientists in this
16 branch of Philip Morris?

17 A. Well, the cigarette generates a wide
18 variety of mutagens, which are chemicals that cause
19 mutations, and the mutagens impact cells.
20 Mutagenicity occurs, and that develops into cancer.

21 And what we were commonly trying to do
22 was to reduce the incidence of mutagenicity by
23 decreasing the number and quantity of mutagens.

24 It's sort of like if you look at a living
25 cell as being sort of a person, and you think of a

1 mutagen as being a bullet shot towards the person.
2 And let's say you're shooting, you know, 100,000
3 bullets, but they are far away. You might not
4 really hit them. We can reduce that to 90,000.
5 Then down to a 10,000. And then down to 5,000.
6 You the probability you are going to hit them. So
7 that is the general philosophy of the safety
8 research. It's to try and reduce the number of
9 mutagens or probability of attack of that cell.

10 Q. When you were being recruited to go work
11 for Philip Morris, did anybody suggest to you in
12 that process that there was an unfair inaccusation
13 being made against cigarettes as the cause of lung
14 cancer?

15 A. No.

16 Q. When you were being oriented to the work
17 that you were to do at Philip Morris by meeting
18 with the other scientists and talking with them
19 about various projects, did anybody ever suggest to
20 you that there was a controversy about whether or
21 not lung cancer was caused by smoking cigarettes?

22 A. Well, the issue of controversy came up.
23 Dr. Osden explained to me that one of his job
24 functions was to maintain the controversy, was to
25 fuel the controversy. I mean, there was no people

1 within the organization weren't -- I mean, in order
2 to solve this problem, you have to recognize the
3 problem, take steps to solve the problem. So, the
4 people that were working on the problem understood
5 the mechanisms that I just described, and they were
6 working to try and reduce that.

7 By the same token, Dr. Osdene expressed
8 the concept that part of his job was to attack
9 outside reports of links between smoking and cancer
10 or smoking and emphysema or things of that sort by
11 maintaining that there's a controversy and
12 providing the information that would discredit or
13 somehow cast down on the outside research.

14 Q. Was that subject with Dr. Osdene
15 something that came up in conversation from time to
16 time throughout your career there?

17 A. Yes. We had many discussions and
18 arguments, if you will, concerning that.

19 Q. And we may see when we get into these
20 documents a little more -- some examples of it, but
21 did Dr. Osdene express sometimes frustration and
22 difficulty at the task of maintaining that there
23 was controversy about these subjects?

24 A. Well, I think, you know, for Dr. Osdene
25 it was an uncomfortable position to be in. And, I

1 mean, Dr. Osdene was trying at the same time to
2 work with us to develop safer products. So, it's
3 sort of -- it's a difficult position Dr. Osdene was
4 in, a very difficult position, because at the same
5 time he's trying to help the people within the
6 research and development division develop a safer
7 product, and on the other hand he's trying to come
8 up with reasons why other people who might purport
9 to discuss things about smoking and disease are
10 incorrect. So, it's kind of a very tough position
11 to be in.

12 Q. During your orientation to Philip Morris'
13 business, did you also review documents available
14 to you that went back in history before your
15 contact with the company?

16 A. Yes. For every project that I reviewed,
17 I went into the library. We had an extensive
18 central file system. And in talking with people, I
19 would ask them for documents. It's a typical
20 scientific method to try and get as much
21 information about past research done there as
22 possible.

23 Q. And within the internal documents of
24 Philip Morris, did you also find references to the
25 acknowledgement of smoking cigarettes as a

1 carcinogenic thing to do?

2 A. Yes. Well, carcinogenic -- and, you
3 know, because sometimes it's not nice to see things
4 like this used in those words. You'll find that
5 this summation of these three things referred to in
6 a lot of reports as biological activity. It is
7 also used when you don't want to be specific about
8 what you are talking about. Caused a bad change.
9 And/or this could be called biological effect.

10 But if you looked at the study and you
11 went and talked with a person, you could usually
12 determine which of the things we were talking about
13 here.

14 There's another, just plain toxicity,
15 because a lot of the compounds are just plain
16 toxic.

17 MR. COFER: We can't see that on the
18 monitor.

19 MR. GAYLORD: You want to move that over
20 to your right.

21 MR. COFER: A little more.

22 MR. GAYLORD: To the right. Right.

23 BY MR. GAYLORD:

24 Q. Biological activity then, would it be
25 fair to call it a euphemism that was used in the

1 company to describe, without using words like
2 carcinogen?

3 A. Yes. And if you read the reports you'll
4 see it referred to a lot.

5 Q. Okay. Now, I just wanted to show you one
6 example and ask you if this is -- again this is an
7 exhibit in evidence, Plaintiff's Exhibit 53, a
8 Philip Morris document, dated March 25, 1964.

9 It's large enough to read. Entitled 1965
10 Cigarette Program Objectives and Approaches. And
11 is this a document you have some familiarity with?

12 A. Yes. I'm going to skip over to the topic
13 of nicotine delivery on here just for moment, and
14 we'll probably come back to that.

15 But with respect to what you learned at
16 Philip Morris and your orientation about the
17 relationship between smoking and lung cancer, Item
18 4 says: "The product design should include
19 consideration of chemical carcinogens within the
20 following framework."

21 Is that one reference to an
22 acknowledgement by Philip Morris that the cigarette
23 products contained cancer-causing chemicals?

24 A. Yes.

25 Q. And were there many others?

1 A. Any others?

2 Q. Were there many other references?

3 A. Oh, yes, many others.

4 Q. Okay. Now, let's turn to a similar
5 series of questions but different topics.

6 In your orientation to the cigarette
7 business as a new employee at Philip Morris and
8 your opportunity to converse with other scientists
9 and work your way through the business -- by the
10 way, let me back that up.

11 Was that was just something you did on
12 your own or was that a specific assignment that you
13 received?

14 A. It was an assignment.

15 Q. You were instructed to familiarize
16 yourself with the whole business?

17 A. Correct. It was a good idea. It was
18 also an assignment.

19 Q. When you say the whole business, it
20 wasn't just science going on and the science part
21 but the manufacturing businesses?

22 A. That's correct. Special effort was made
23 to make sure I even went out with, for example, the
24 leaf purchasing team to buy tobacco. And, you
25 know, out in the field. I went to the farms.

1 Philip Morris doesn't grow tobacco, but -- not in
2 the United State's, but they buy it off the open
3 market, but we had to understand how it was raised
4 so we had actually to visit farms, and in our
5 research we actually did work on growing tobacco on
6 the farms. So all of that, right from the place
7 where they grew it, to the place where they
8 processed it, all the way through the entire
9 process.

10 Q. Dr. Farone, before I leave the subject of
11 cancer and the understandings and expressions of
12 that subject, as you became oriented to the
13 business, let me ask one question about that.

14 Did you ever run into anybody, in your
15 orientation to the business of Philip Morris, any
16 scientists, any manager, did anybody ever tell you
17 that cigarettes smoking did not cause cancer?

18 A. No. And in talking with them -- the
19 science doesn't really work that way. You have a
20 hypothesis. And your cumulative evidence which
21 leads you to a hypothesis. The hypothesis is that
22 smoking causes cancer by the mechanism I just
23 described. In order to refute that, my hypothesis,
24 you have to present evidence to the contrary.

25 So I never heard anyone say that they had

1 evidence to the contrary.

2 What you would hear occasionally was that
3 well so and so had published a paper and that paper
4 wasn't done very well.

5 So, that doesn't provide additional
6 evidence for the hypothesis. That is the nature of
7 the so-called controversy. This controversy is
8 attacking other people's support of the hypothesis.
9 But I never heard anyone at Philip Morris say that
10 they had any evidence to refute that hypothesis at
11 no time.

12 Q. All right.

13 Now, I want to move to the subject of
14 nicotine and addiction, and, again, ask you what
15 you learned, what people brought to your attention,
16 what became your understanding from your
17 orientation about the internal knowledge of Philip
18 Morris about the addictiveness of nicotine.

19 A. Well, the operating hypothesis was, even
20 before I went there, it was never denied, is that
21 people smoke for nicotine. That is the reason.
22 Other alkaloids in tobacco. There are some other
23 ones; may have some minor effects. There are some
24 other things, but basically it's nicotine.

25 There was -- I went there with the

1 knowledge, for example, in the 1950's. There was a
2 product on the market called Sano cigarettes, and
3 it was King Sano. That was a denicotinized
4 cigarette. And unlike decaffeinated colas, which
5 captured the market, those products never made it.
6 So, there was a general conclusion that was
7 accepted that people smoked for nicotine.

8 And in addition, when I went, Philip
9 Morris was in the process of introducing the Merit
10 cigarette, which is the mid-'70s, when the low-tar
11 category really came into being. And there was a
12 recognition if you reduce the nicotine too far
13 people might not smoke their product. On the other
14 hand, the nicotine itself as far as was known was
15 not -- was toxic, but not mutagenic, and it's not
16 carcinogenic.

17 So, what was being done there and
18 throughout the industry was to maintain the level
19 of nicotine to the smoker while reducing the tar.

20 So, while in general the nicotine was
21 being reduced, it was not being reduced as much as
22 the tar was being reduced.

23 So, everything was focused on the
24 maintaining nicotine in smoke.

25 Q. I know -- I think I want to go through,

1 and not be too tedious about it, a series of
2 documents, and with respect to the nicotine
3 question.

4 Did you acquire knowledge from a great
5 many documents that were in the files and archives
6 of Philip Morris as part of your orientation about
7 this subject of the relationship between nicotine
8 and the reasons why people smoke, about the
9 addictive quality of nicotine, habit forming,
10 dependent forming, chemical-dependence forming
11 qualities?

12 For example, Plaintiff's Exhibit 36, I'll
13 set that aside and come back in a moment.
14 Plaintiff's Exhibit 36 is dated August 3, '69,
15 '59 -- it's a lousy old copy, and it contains the
16 question -- this is from or to a Dr. Dupris in
17 psycholological research: Why do people smoke? And
18 it goes on in several parts. But item 3, 1959, is
19 addiction. Is that one of the documents that you
20 are familiar with?

21 A. Yes.

22 Q. Is that part of the basis for your saying
23 that that was an established understanding of
24 Philip Morris?

25 A. Correct. There are many documents.

1 Q. Exhibit 42, Philip Morris Incorporated,
2 Tobacco and Health. R&D approach. This was
3 presented by Dr. Wakeham at a meeting held in the
4 New York office, November 15th, 1961, which states
5 on Page a number of which I can't find, but it's
6 somewhere in the document. "Controlled nicotine in
7 filler and smoke. Even though nicotine is believed
8 essential to cigarette acceptability, a reduction
9 in the level may be desirable for medical reasons."

10 Let me ask you about that phrase
11 acceptability. Is acceptability another euphemism
12 used at Philip Morris with respect to smoking and
13 cigarettes?

14 A. Well, I don't know how it's being used in
15 this context. Normally one talks about
16 satisfaction and impact. So, I can't -- I don't
17 know what was meant by acceptability, other than
18 you need to have it.

19 Q. Okay. When you say you need to have it,
20 you mean it was understood at Philip Morris that
21 the smoker needed to have nicotine in order to have
22 the product be accepted?

23 A. That's right.

24 Q. And back to Exhibit 53, March 25th, 1964,
25 the section on nicotine delivery. Again, this is

1 The 1965 Cigarette, is the name of the document.
2 Program objectives and approach. Nicotine delivery
3 level should be zero point seven milligrams,
4 minimum.

5 A. That was later modified. You don't need
6 that much, actually.

7 Q. Okay. Was the concept that there was a
8 minimum level of nicotine that you needed ever
9 modified?

10 A. The idea is that you needed to have a
11 certain amount of nicotine before the smoker will
12 feel satisfied. And the amount of nicotine that is
13 required depends on a lot of things, like what form
14 nicotine is in, because this is in the tar going to
15 the smoker. And it also depends on what other
16 things might be in the smoke to modify the effect
17 of nicotine. So, at this early time, the level was
18 thought to be point seven. When I was there the
19 level that would be satisfying turned out to be
20 between point two and a point three, around in
21 there. Actually, about half that level.

22 Q. Okay.

23 Now, this is, I guess, a foreshadowing.
24 We'll get there later. But I don't want to step
25 into that completely right now.

1 But preview, was there a time when Philip
2 Morris learned to do and did do a number of things
3 to modify how much nicotine was necessary and how
4 it effected the smoker?

5 A. Well, how much is necessary is how much
6 is necessary. But how much you deliver and in what
7 form was modification that was done by Philip
8 Morris, yes.

9 The other thing I would like to point out
10 is that when you see numbers like this, point seven
11 milligrams, that refers to the nicotine delivery
12 per cigarette as measured by the Federal Trade
13 Commission, the FTC, and unfortunately that is not
14 the way people smoke.

15 So you in provide somebody half that and
16 they suck down the cigarette twice as hard, they
17 would get that level even though the FTC label said
18 point 35 or point 30 on the box. So we have to be
19 very careful when we see these numbers not to think
20 that they described the actual delivered nicotine
21 to the smoker.

22 Q. Okay.

23 Without focusing as much on the numbers
24 or the precision with which they were known at some
25 point in time, was it always known by Philip Morris

1 that for the cigarette to be a successful product
2 it had to be able to deliver some amount of
3 nicotine to the smoker?

4 A. Yes.

5 Q. Because of the drug effect of nicotine on
6 the smoker?

7 A. Yes.

8 Q. The note also says in their projections
9 for 1965, Item B, under nicotine delivery, "Add
10 nicotine to cigarette and define contribution of
11 nicotine to be flavor."

12 All I want to ask about that right now is
13 was it within the technology at Philip Morris that
14 was understood and available to them to manipulate
15 how much nicotine was in the cigarette?

16 A. Yes.

17 Q. Did Philip Morris, to your knowledge,
18 always have the ability, from the time at least
19 that you were there, to remove the nicotine in the
20 cigarette?

21 A. Yes, they did.

22 Q. And to put back as much as they chose to?

23 A. Correct.

24 Q. I sabotaged myself by putting my notes on
25 one of these documents.

1 Plaintiff's Exhibit 59, Special Report
2 No -- this is out of focus on the photocopy.
3 Special report No. 248. Market potential of a
4 healthy cigarette. Plaintiff's 59. Are you
5 familiar with this document which is a report of
6 June 1966 written by M. Johnston, Jr?
7 A. Yes.
8 Q. Is that Myron Johnson?
9 A. That is Myron Johnson, supervisor at that
10 time of Dr. Dunn.
11 Q. And it says approved by Dr. Dunn?
12 A. Yes.
13 Q. And this would have been among the
14 documents available for your review as your
15 oriented yourself to the company?
16 A. Yes.
17 Q. And on a page called Conclusions, "The
18 anti-cigarette propaganda will probably be more
19 effective in reducing the rate of smoker
20 recruitment than in stimulating smokers to quit or
21 switch."
22 Item 4: "The Surgeon General's report
23 had markedly less effect on the demand for health
24 cigarettes than the first health scare in the
25 1950s. Any future heath scares will probably have

1 less effect."

2 And Item 5: "Thus a new healthy
3 cigarette entry could not rely on increased demands
4 for health cigarettes but would have to take its
5 place at the expense of existing brands of health
6 cigarettes."

7 Was it part of the understanding that you
8 gained from your fellow employees at Philip Morris
9 that it was known that the health concerns about
10 cigarettes were more effective in preventing people
11 from starting smoking than from in persuading them
12 to quit smoking?

13 A. Well, actually not really, by the time I
14 got there. This is an earlier document. But the
15 interesting thing about the document, if you could
16 put it back there for a minute.

17 Q. Okay. I have got more about it, too?

18 A. It talks about less effect on the demand
19 for health cigarettes. So, you might -- I asked
20 the question well, what are we talking about?
21 What's health cigarettes? The answer is that when
22 they first put a filter on a cigarette that was
23 viewed by the industry as being a health cigarette.
24 In other words, it was an implied health claim
25 because the filter obviously is going to help you

1 get rid of some of the bad stuff. That's what's
2 being referred to in the first health scare in the
3 '50s. '50s where the advent of the filtered
4 cigarette. And then the '70s, which comes after
5 this document, the low tar era.

6 There's another thing in between which is
7 also considered a health cigarette, and is that the
8 addition of menthol. Menthol was viewed as
9 being -- you know, menthol is used for ease in
10 coughing. Menthol is in cough drops and things
11 like that. So, if you have trouble with your
12 throat, and things like that you put menthol in a
13 cigarette, obviously, it's going to help you.

14 So when I first heard about this stuff I
15 was interested in what that meant.

16 Q. When you said obviously that is going to
17 help, are you saying that it really was going to
18 help or are you saying that was an approach?

19 A. That was an approach. I didn't see any.
20 I didn't have any data, nor have I seen any data at
21 Philip Morris that would imply or show that a
22 menthol cigarette was less carcinogenic or less
23 toxic than a regular cigarette.

24 Q. Was the concept of a health cigarette as
25 you have just defined it something that was used at

1 Philip Morris as a kind of an implied
2 representation about products to the effect that
3 consumers would take them as more healthy?

4 A. The whole industry, actually. It's not a
5 Philip Morris thing. It's just those are
6 categories within the industry that came about
7 because of the perception that those things would
8 be somehow safer.

9 Q. Okay. We'll probably get to some other
10 documents that talk about perception of filtration
11 being what mattered.

12 On this page, Page 5, Exhibit 59, was
13 Mr. Johnson's statement, quote, "A cigarette that
14 does not deliver nicotine cannot satisfy the
15 habituated smoker and cannot lead to habituation
16 and would, therefore, almost certainly fail."

17 Was that notion one of the sources and
18 consistent with the information you received about
19 the company's awareness of the addictiveness of
20 nicotine?

21 A. Yes.

22 Q. And it's an essential role in the ability
23 to continue to sell cigarettes?

24 A. Yes.

25 Q. I'm going to try move a little more

1 quickly through some of these documents. Exhibit
2 67, to Dr. Wakeham, from Dr. Dunn, February 19,
3 1969, and this statement, it's very hard to read,
4 but I'll read it. "I would be more cautious in
5 using the formic medical model. Do we really want
6 to tout cigarette smoke as a drug? It is, of
7 course, but there are dangerous FDA implications to
8 having such conceptualization go beyond these
9 walls."

10 Was that a concept about the role of
11 nicotine that was familiar to you through your
12 orientation to this product with the company?

13 A. Yes.

14 Q. Was that concern about letting anybody
15 know that nicotine was, in fact, a drug frequently
16 expressed by your fellow scientists and employees
17 at Philip Morris?

18 A. Part of openly publicizing, yes, it was a
19 concern. But we did a lot of work on, you know,
20 drug type research on making nicotine analogs,
21 chemical compounds that could take the place of
22 nicotine, but so I don't think there was any
23 confusion within the company as to the fact that
24 this was a drug and what it was doing.

25 Q. Okay. This is a document, No.

1 Plaintiff's 72, from Dr. Dunn in the Fall of 1969.
2 It is the first draft and annual report to the
3 Philip Morris board, by vice president for research
4 and development Dunn, entitled "Here Is Why One
5 Smokes."

6 And on the second page: "We have then as
7 our first premise that the primary motivation for
8 smoking is to obtain the pharmacological effect of
9 nicotine."

10 A. I'm sorry. I think you said this was
11 Wakeham's document.

12 Q. This is Dr. Dunn in the Fall of 1969, a
13 draft report to the board.

14 MR. COFER: Excuse me, counsel. What's
15 the number?

16 MR. GAYLORD: Plaintiff's Exhibit 72.

17 MR. COFER: Thank you.

18 BY MR. GAYLORD:

19 Q. This is from Dr. Dunn to Dr. Wakeham.
20 It's a draft perhaps of Wakeham's talk?

21 A. Well, I saw it in the, deposition.
22 Dr. Wakeham's materials. So, I didn't, but yes.

23 Q. I think our information is that this is
24 Dr. Dunn's draft for Dr. Wakeham.

25 A. Okay.

1 Q. And the pharmacological effect is another
2 way of saying nicotine is a drug?

3 A. Yes.

4 Q. Plaintiff's Exhibit 74: "Smoker
5 psychology research by Dr. Wakeham." Presented to
6 the board. Perhaps this is the final form of that
7 last draft.

8 And it contains a statement on Page 11:
9 "We are of the conviction, in view of the foregoing
10 that the ultimate explanation for the perpetuated
11 cigarette habit resides in the pharmacological
12 effect of smoke upon the body of the smoker. The
13 effect being most rewarding to the individual under
14 stress."

15 Is that consistent with your
16 understanding of the company's understanding of the
17 relationship between nicotine as a drug and the
18 habit of smoking?

19 A. Yes.

20 Q. Plaintiff's 84. Philip Morris
21 interoffice correspondence to Mr. Chris Bolton,
22 from Al Udo. Subject: The chemistry of Kool and a
23 recommendation. Date May 24, 1972.

24 And the passage says: "Although more
25 people talk about taste, it is likely that greater

1 numbers smoke for the narcotic value that comes
2 from the nicotine."

3 Is that another statement of the same
4 point and its recognition and acknowledgement at
5 Philip Morris as the reason why people smoke?

6 A. Yes.

7 Q. There's a document that the jury has seen
8 in some form, at least, before, Plaintiff's Exhibit
9 6. Motives and Incentives in cigarette smoking,
10 Dr. William Dunn, Philip Morris Research Center.

11 And I think this is the famous tropical
12 island speech, St. Martins.

13 Page 4: "No one has ever become a
14 cigarette smoker by smoking cigarettes without
15 nicotine."

16 Page 5: "Cigarette is in fact among the
17 most awe-inspiring examples of the ingenuity of
18 man. Let me explain my conviction. The cigarette
19 should be conceived not as a product but as a
20 package."

21 The package is nicotine?

22 A. The product is nicotine.

23 Q. Thank you. The product is nicotine.

24 "Think of the cigarette package as a
25 storage container for that day's supply of

1 nicotine. Think of the cigarette as a dispenser
2 for a dose unit of nicotine. Think of a puff of
3 smoke as the vehicle of nicotine. Smoke is beyond
4 question the most optimized vehicle of nicotine,
5 and the cigarettes the most optimized dispenser of
6 smoke."

7 Are these statements all part of the
8 milieu you entered into when you became an employee
9 of Philip Morris and part of the uncontroversial
10 acknowledgement of Philip Morris and its scientists
11 about the role of nicotine in smoking?

12 A. Yes.

13 Q. Are they, in fact, the primary basis for
14 a great deal of research that you oversaw and that
15 was done by your department?

16 A. Yes. The idea was to maintain nicotine
17 while reducing the carcinogens, mutagens, and the
18 other chemicals that cause disease.

19 Q. The last paragraph of this exhibit:
20 "Having done a number of studies -- " and there's
21 some numbers and letters that I expect describe the
22 studies -- "in which we have systematically
23 manipulated tar and nicotine parameters of
24 cigarettes. We are trying to see if we can make
25 any overall conclusions. Specifically, we are

1 trying to predict nicotine-tar ratios for optimal
2 cigarette acceptability and differing tar
3 deliveries."

4 Is that in fact a notion that underlay
5 the primary reason for research, most of the
6 research that was done under your supervision?

7 A. Not most of it, but the part of it that
8 related to low-tar cigarettes.

9 Q. All right.

10 MR. COFER: Excuse me. That was 86,
11 counsel? What number that was?

12 MR. GAYLORD: Yeah, it was 86.

13 MR. COFER: Thank you.

14 BY MR. GAYLORD:

15 Q. Plaintiff's Exhibit 94: Smoking Impact.
16 Very hard to read, but it says October 1975,
17 possibly, but I think it's 75.

18 A. I think it's 75. This I think occurred
19 the year before I came there, this study.

20 Q. This is a document that you are familiar
21 with?

22 A. Yes.

23 Q. Smoking Impact. And it seems to say:
24 "Nicotine is the main determinant for sustaining
25 the smoking habit; although, other factors such as

1 smell, quality, et cetera, determine the preference
2 for a particular cigarette."

3 Further corroboration of the same
4 acknowledgement about the role of nicotine in
5 smoking?

6 A. Yes.

7 Q. Bring it up to date. More current Philip
8 Morris interoffice memo. This is Plaintiff's
9 Exhibit 139. November 8, 1990. Now that is, of
10 course, after you have finished your period of time
11 at Philip Morris. This is to C.K. Ellis. Is that
12 somebody you know?

13 A. Yes.

14 Q. Who is Cathy Ellis, when you were there?

15 A. She was a junior scientist.

16 Q. And F.P. Gullotta?

17 A. Yes, Frank Gullotta was in charge of the
18 EEG program. And Sydney Hayes I remember was his
19 assistant.

20 Q. Okay.

21 Now, this says subject, and it's in
22 French. So, I'm bound to butcher it, but "raison
23 d'etat." How do you say that?

24 A. Raison d'etat.

25 Q. D'etat?

1 A. I think.

2 Q. We have shown that there are optimal
3 cigarette nicotine deliveries for producing the
4 most favorable physiological and behavioral
5 responses. This is a retrospective on what they
6 have done in the prior period of time.
7 And that statement is consistent, is it
8 not, with what you have told us so far about what
9 was known and understood in the late '70s and '80s
10 at Philip Morris?

11 A. That's correct.

12 MR. GAYLORD: Well, talking further about
13 some of these terms like delivery and that sort
14 of thing, but just to establish the fact that
15 Philip Morris knew about this.

16 I think it's about the time and a break
17 in subject for lunch, Your Honor.

18 THE COURT: Thank you, Mr. Gaylord.

19 Thank you, jurors. Notes on the chair,
20 please. Remember not to talk about the case.
21 Watch your step. Oh, we'll start at 1:30.

22 Jurors, 1:30. Thank you.

23 * * *

24 (Whereupon, the jury exited the courtroom.)

25 * * *

1 THE COURT: Anything for the record from
2 Plaintiffs?

3 MR. GAYLORD: No, Your Honor.

4 THE COURT: Mr. Cofer.

5 MR. COFER: Yes. One thing. In
6 Mr. Thomas' opening statement he referred to the
7 other products the Philip Morris companies owns
8 and sells. I believe testimony today of
9 Dr. Farone opened the door to evidence regarding
10 the diversification efforts of Philip Morris.

11 I raise this because Plaintiff had filed
12 a motion in limine to exclude that sort of
13 evidence.

14 I want to put Plaintiffs on notice that I
15 believe the door has now been opened, and I
16 haven't decided what I'm going to do with it.
17 But in light of what happened yesterday, I want
18 to make it clear, my intentions.

19 MR. GAYLORD: I don't think the fact that
20 this witness knows the word diversification and
21 went there with that subject on his list. It's
22 part of his qualifications opens the subject
23 of -- and I'm not even sure where it would go,
24 but I don't know where any relevance beyond that
25 as part of his qualifications is gained by the

1 fact that he mentioned it.

2 THE COURT: Well, I appreciate the
3 warning, Mr. Cofer. Let's wait to have the
4 conclusion of the witness' direct, and then you
5 can preview it for us.

6 As I recall, the motion in limine had to
7 do with a risk of what Plaintiffs described as
8 unfair prejudice by describing Philip Morris as
9 the manufacturer of what?

10 MR. COFER: Philip Morris owns Kraft and
11 General Foods.

12 THE COURT: All right. All of those
13 clean wholesome things, she's saying for summary
14 purposes.

15 MR. COFER: Right.

16 THE COURT: And the witness has talked
17 about 20 percent of his job was in the area of
18 diversification, and we'll just see how much
19 emphasis Plaintiffs place on it in the direct
20 testimony so I can balance it against what
21 plaintiffs thought was an unfair risk of bringing
22 in those other products. We'll take it up after
23 direct is concluded.

24 MR. COFER: Thank you.

25 THE COURT: Anything? Okay.

1 Anything else?
2 MR. GAYLORD: Not for Plaintiff.
3 THE COURT: All right.
4 Mr. Tauman, you say 1:25?
5 MR. TAUMAN: Yeah, that would be fine.
6 MR. DUMAS: Yes, Your Honor.
7 THE COURT: Okay.
8 The record will resume at 1:20, the
9 fight.
10 * * *
11 (Whereupon, the a.m. proceedings adjourned.)
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1 STATE OF OREGON)
) SS.
2 County of Multnomah)

3
4 I, Jennifer Wiles, hereby certify that I
5 am an Official Court Reporter to the Circuit
6 Court of the State of Oregon for Multnomah
7 County; that I reported in Stenotype the
8 foregoing proceedings and subsequently
9 transcribed my said shorthand notes into the
10 typewritten transcript, pages 1 through 160, both
11 inclusive; that the said transcript constitutes a
12 full, true and accurate record of the
13 proceedings, as requested, to the best of my
14 knowledge, ability and belief.

15 Dated this 15th day of July, 1999 at
16 Portland, Oregon.

17
18
19

20 _____
 Jennifer Wiles
 Official Court Reporter

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